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v.
Robert B. Elliott

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for the Sixth Circuit

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EDITOR'S NOTE

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try	Date	Note	Proceedings and Orders
1	Oct 3 1985	G	Petition for writ of certiorari filed.
2	Nov 6 1985		DISTRIBUTED. November 27, 1985
3	Nov 12 1985	X	Brief of respondent in opposition filed.
4	Dec 2 1985		Petition GRANTED. *****
6	Dec 6 1985		Order extending time to file brief of petitioner on the merits until January 24, 1986.
7	Jan 23 1986		Brief amicus curiae of Kansas, et al. filed.
8	Jan 24 1986		Brief of petitioners Univ. of Tennessee, et al. filed.
9	Jan 24 1986		Brief amicus curiae of Equal Employment Advisory Council filed.
0	Jan 24 1986		Joint appendix filed.
1	Feb 10 1986		Record filed.
2	Feb 10 1986		Certified copy of original record and proceedings, 2 volumes, received.
3	Feb 12 1986		Record filed.
5	Feb 18 1986		Order extending time to file brief of respondent on the merits until March 7, 1986.
6	Mar 6 1986		Record filed.
7	Mar 6 1986		Certified copy of transcript, 51 volumes, received. (Box).
0	Mar 7 1986		Brief amicus curiae of EEOC filed.
1	Mar 7 1986		Brief of respondent filed.
2	Mar 14 1986		SET FOR ARGUMENT, Monday, April 21, 1986. (1st case)
3	Mar 14 1986		CIRCULATED.
4	Mar 28 1986	X	Reply brief of petitioners Univ. of Tennessee, et al. filed.
5	Apr 21 1986		ARGUED.

85-588

No.

Supreme Court, U.S.

FILED

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JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, et al., *Petitioners,*

VS.

ROBERT B. ELLIOTT, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTION PRESENTED

Whether traditional principles of preclusion apply in an action under Title VII, section 1983, and other civil rights statutes to preclude issues fully and fairly litigated before a state administrative agency acting in a judicial capacity.

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No.

In the Supreme Court of the United States
OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, et al., *Petitioners*,
 vs.

ROBERT B. ELLIOTT, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS
 FOR THE SIXTH CIRCUIT**

Petitioners¹ respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 9, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 766 F.2d 982 (6th Cir. 1985), and a copy of the slip opinion appears in the Appendix hereto. The memorandum

1. Petitioners are the defendants below—The University of Tennessee, The University of Tennessee Institute of Agriculture, The University of Tennessee Agricultural Extension Service, University officials (M. Lloyd Downen, Willis W. Armistead, Edward J. Boling, Haywood W. Luck, and Curtis Shearon), members of the Madison County Agricultural Extension Service Committee (Billy Donnell, Arthur Johnson, Jr., Mrs. Neil Smith, Jimmy Hopper, and Mrs. Robert Cathey), Murray Truck Lines, Inc., Tom Korwin, and Tommy Coley. Petitioner Coley is appearing *pro se*.

decision of the United States District Court for the Western District of Tennessee and the final agency order in the contested case hearing under the Tennessee Uniform Administrative Procedures Act also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 9, 1985, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1964).

STATEMENT OF THE CASE

The University of Tennessee is an agency of the State of Tennessee, and respondent is a black employee of the University's Agricultural Extension Service. The University proposed to terminate respondent's employment for disciplinary reasons. Respondent elected to contest the proposed termination in a hearing under the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 through -323 (Supp. 1984). Before the hearing was held, however, respondent filed this action under Title VII and 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, seeking an injunction against any action with respect to his employment, one million dollars in damages, and certification of a class action. The district court did not certify a class. After entry and dissolution of a temporary restraining order, the district court ruled that respondent had failed to meet the prerequisites for preliminary injunctive relief and removed any restraint regarding employment action against respondent. Respondent elected

to proceed with the administrative hearing and did not seek further action in federal court.

In compliance with the Administrative Procedures Act, respondent's hearing was conducted with complete trial rights including discovery, subpoenas, representation by counsel, examination and cross-examination of witnesses, and filing of pleadings, briefs, and proposed findings of fact. The administrative record consists of 55 volumes with over 5,000 pages of testimony from over 100 witnesses and 159 exhibits. Respondent insisted that evidence of alleged racial discrimination be admitted in the administrative hearing. The University objected that this evidence should be introduced instead in respondent's Title VII action. Despite this objection, the Administrative Law Judge admitted voluminous evidence of alleged racial discrimination against respondent. Nonetheless, the Administrative Law Judge found that the proposed termination was not racially motivated. Finding further, however, that the University's proof was insufficient to warrant respondent's termination, the Administrative Law Judge ordered that respondent be transferred to another county under new supervisors. The findings of the Administrative Law Judge were affirmed on appeal to the Agency Head.

Tenn. Code. Ann. § 4-5-322 (Supp. 1984) provides for judicial review of a final agency order upon the filing of a petition within sixty days of the order. Respondent failed to file a petition for judicial review within sixty days. Instead, after his transfer had been accomplished and eighty-four days after the final agency order, respondent filed a motion in the district court for a temporary restraining order, preliminary injunction, and stay of the final agency order. The University defendants opposed the motion and amended their earlier motion for summary judgment. In granting summary judgment for the de-

fendants, the district court held that it lacked subject matter jurisdiction under Tenn. Code Ann. § 4-5-322 (Supp. 1984) to review the merits of the final agency order and that it was otherwise precluded by res judicata principles from reviewing the issues fully litigated in the administrative hearing. The Sixth Circuit reversed, holding that a final state administrative judgment is never entitled to preclusive effect in a subsequent federal court action under either Title VII or section 1983.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE PRECLUSIVE EFFECT OF ADMINISTRATIVE ADJUDICATIONS AND THE APPLICATION OF TRADITIONAL PRINCIPLES OF PRECLUSION IN SUBSEQUENT SECTION 1983 ACTIONS.

In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), this Court held that traditional principles of res judicata are applicable to administrative proceedings "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. . . ." *Id.* at 422. Applying this principle to the facts in *Utah*, this Court concluded as follows:

[T]he Board was acting in a judicial capacity . . . the factual disputes were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any ad-

verse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.

Id. By holding that traditional principles of res judicata are applicable to administrative proceedings, this Court recognized the modern model of administrative procedure which often closely approximates judicial procedure and thus merits the same finality.

In the decision below, the Sixth Circuit acknowledged the holding in *Utah* but refused to apply it to the question of whether a final state administrative judgment precludes relitigation of issues in a federal civil rights action. The court treated the holding as limited to the res judicata effect of federal administrative decisions in subsequent federal court proceedings. Appendix at A14-15, A18. There is nothing in this Court's opinion in *Utah*, however, to suggest that the holding is so limited. This Court expressly invoked general principles of res judicata and described their application to "an administrative agency acting in a judicial capacity" without use of the delimiting term "federal agency." *Id.* at 421-422. Moreover, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court cited the *Utah* holding approvingly in considering the adequacy of state proceedings to be given preclusive effect in a subsequent Title VII action:

Certainly, the administrative nature of the fact-finding process is not dispositive. In *United States v. Utah Construction & Mining Co.* [citation omitted], we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity" [citation omitted].

Id. at 484-485 n.26. The Sixth Circuit clearly erred, therefore, in failing to follow this Court's opinion in *Utah* and to apply traditional principles of res judicata to the final administrative judgment in this case.

Furthermore, the failure of the Sixth Circuit to follow the *Utah* holding leads to a conflict between the decision below and the opinion of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980). In *Allen*, this Court held that nothing in the language or legislative history of section 1983 suggests a congressional intention to contravene traditional doctrines of preclusion. *Id.* at 97-98. In so holding, this Court rejected the suggestion "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id.* at 103. This Court reaffirmed *Allen* in *Migra v. Warren City School District*, U.S., 104 S. Ct. 892 (1984), extending application of res judicata principles in section 1983 actions from the issue preclusion rule of *Allen* to preclusion of the claim itself. The Sixth Circuit's refusal to give preclusive effect to the final administrative judgment in this case rests, however, on the assumption that "Congress provided a civil rights claimant with a federal remedy in a federal court, with federal process, federal factfinding, and a life-tenured judge." Appendix at A20. This assumption cannot be reconciled with this Court's holding in *Allen* and *Migra* that section 1983 creates no exception to traditional rules of preclusion, which are applicable, according to the *Utah* holding, to administrative adjudications as well as judicial proceedings.²

2. The decision below also conflicts in principle with the holding in *Allen* and *Migra* that the preclusive effect of state court proceedings in subsequent section 1983 actions is governed

(Continued on following page)

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE PRECLUSIVE EFFECT OF STATE ADMINISTRATIVE ADJUDICATIONS IN SUBSEQUENT FEDERAL CIVIL RIGHTS ACTIONS.

In refusing to give preclusive effect to the final administrative judgment of the state agency in this case, the Sixth Circuit conceded that its decision conflicts with that of other circuits. Appendix at A24-25. Although the court conceded conflict only with respect to the application of preclusion principles in civil rights actions under 42 U.S.C. § 1983, the decision also conflicts with decisions of the Third and Seventh Circuits in Title VII actions. See *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842 (7th Cir. 1985) (slip op. in Appendix at A185); *O'Hara v. Board of Education*, 590 F. Supp. 696 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985).

In refusing to apply principles of res judicata to preclude respondent's Title VII action, the Sixth Circuit held that the issue was controlled by the following general principle stated by this Court in footnote 7 of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 470 (1982): "[U]nreviewed administrative determinations by state agencies . . . should not preclude . . . [de novo] review

Footnote continued—

by the state's own law of res judicata. The Sixth Circuit failed even to consider whether the state administrative adjudication in this case would have been afforded preclusive effect in the courts of the State of Tennessee. If the Sixth Circuit had looked to the law of res judicata in Tennessee, it would have found that an administrative adjudication by a state agency acting in a judicial capacity is entitled to preclusive effect in Tennessee courts. See *Polsky v. Atkins*, 197 Tenn. 201, 270 S.W.2d 497 (1954); *Fourakre v. Perry*, 667 S.W.2d 483 (Tenn. App. 1983); *Purcell Enterprises, Inc. v. State*, 631 S.W.2d 401 (Tenn. App. 1981).

[in federal court] even if such a decision were to be afforded preclusive effect in a State's own courts." The Sixth Circuit rejected petitioner's argument that this general principle, considered in the light of this Court's citation of the *Utah* holding with approval in footnote 26, must be construed to apply only with respect to administrative decisions rendered by agencies possessing investigatory rather than adjudicatory authority. Appendix at A12-13. With respect to respondent's action under 42 U.S.C. § 1983 and the other Reconstruction Civil Rights Statutes, the Sixth Circuit first concluded that the *Utah* holding does not apply in the state-to-federal context and then refused to create, as it put it, a rule of administrative preclusion in section 1983 actions. Appendix at A20.

Less than two weeks after the Sixth Circuit's decision in this case, the Seventh Circuit decided *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842 (7th Cir. 1985) (slip op. in Appendix at A185). The decision below directly conflicts with the Seventh Circuit's opinion on the question presented by this petition. Like the present case, *Buckhalter* involved both a Title VII action and an action under 42 U.S.C. § 1981. Beginning with this Court's acknowledgement of "administrative res judicata" in footnote 26 of the *Kremer* opinion, the Seventh Circuit considered the *Utah* criteria to determine whether principles of res judicata should be applied to plaintiff's Title VII action. Finding that the state administrative agency had acted in a judicial capacity and that both parties had had a full and fair opportunity to litigate their case, the Seventh Circuit concluded that principles of res judicata should be applied to determine whether the plaintiff's Title VII action was precluded by the prior administrative proceeding. Appendix at A200-206. Unlike the Sixth Circuit in the decision below, the Seventh Circuit expressly rejected

a broad interpretation of footnote 7 of the *Kremer* opinion, concluding that it applied only to judicially unreviewed administrative decisions by agencies exercising investigatory rather than adjudicatory authority. The court noted that a narrow interpretation of footnote 7 is supported by this Court's approving citation of the *Utah* holding in footnote 26 of the same opinion. Appendix at A208-210. Finally, the Seventh Circuit held that the principles of "administrative res judicata" are applicable to civil rights actions brought under section 1981 as well as Title VII and thus dismissed the plaintiff's claims under both statutes. Appendix at A212. The decision below is thus squarely and irreconcilably in conflict with the Seventh Circuit's decision in *Buckhalter*.

With respect to respondent's Title VII action, the decision below is also squarely and irreconcilably in conflict with the Third Circuit's decision in *O'Hara v. Board of Education*, 590 F. Supp. 696 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985). In determining whether a federal court may give collateral estoppel effect to a state administrative agency decision, the district court in *O'Hara* looked not only to the *Utah* criteria of whether the agency was acting in a judicial capacity and whether the parties had an adequate opportunity to litigate the issues but also to whether a state court would give preclusive effect to the administrative decision. *Id.* at 701. The *O'Hara* court thus relied in part on the full-faith-and-credit requirement of 28 U.S.C. § 1738 (1964). In the decision below, however, the Sixth Circuit summarily rejected any application of traditional principles of full-faith-and-credit to adjudicatory proceedings before administrative agencies. Appendix at A11, A16. Therefore, although the Third Circuit affirmed the district court decision in *O'Hara* without an opinion, its decision must be considered as directly in conflict with the decision below.

With respect to respondent's action under 42 U.S.C. § 1983 and the other Reconstruction statutes, the decision below directly conflicts with decisions of the Second and Eighth Circuits. In *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42 (2d Cir. 1985), the Second Circuit held that a prior finding of probable cause to arrest by an administrative law judge precluded the plaintiff's section 1983 action for false arrest, false imprisonment, and malicious prosecution. The Second Circuit based its holding on this Court's opinion in *Utah*. Similarly, in *Steffan v. Housewright*, 665 F.2d 245 (8th Cir. 1981), the Eighth Circuit relied on the *Utah* holding to preclude the plaintiff's due process claims under section 1983. The Sixth Circuit's refusal to apply the *Utah* holding in a section 1983 action thus presents a clear conflict with decisions by the Second and Eighth Circuits.

On the other hand, the Second and Eighth Circuits have failed to give preclusive effect to state administrative proceedings in subsequent Title VII actions, relying on footnote 7 of this Court's opinion in *Kremer*. See *Heath v. John Morrell & Co.*, 768 F.2d 245 (8th Cir. 1985); *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir. 1985). Similarly, the Fourth Circuit has held in a Title VII action that "unreviewed administrative determinations by state agencies do not preclude a trial *de novo* in federal court." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 361 n.6 (4th Cir. 1985). In an earlier decision, *Moore v. Bonner*, 695 F.2d 799 (4th Cir. 1982), the Fourth Circuit had failed to give preclusive effect to a state administrative judgment in a subsequent section 1983 action, holding that preclusion is not required by the full-faith-and-credit requirement of 28 U.S.C. § 1738 (1964) and failing to address this Court's decision in *Utah*.

These decisions from the Second, Third, Fourth, Seventh and Eighth Circuits, together with the Sixth Circuit's

decision below, demonstrate that a serious and continuing conflict exists among the courts of appeals on the question presented by this petition. Moreover, the conflict has become particularly intense since this Court's 1982 decision in *Kremer*, with much of the debate centering on inferences to be drawn from footnotes 7 and 26 of that opinion. This important question of federal law should be decided by this Court. The existing conflict will not abate in the absence of a decision by this Court.

3. THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS CONCERNS A MATTER OF NATIONAL IMPORTANCE.

The Sixth Circuit's decision in this case seriously undermines the finality of state administrative proceedings and encourages repetitious litigation. It thus contravenes both the public interest in judicial economy and the private interest in repose underlying the doctrine of res judicata. See 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4403 (1981). It produces the possibility of conflicting results on the same issue and burdens the federal courts with the necessity of hearing issues which have already been litigated fully and fairly between the parties.

Moreover, many states have enacted administrative procedures acts which are similar to the one in this case. See 1 K. Davis, *Administrative Law Treatise* § 1:10 (1983). The adjudicatory nature of contested case hearings under these acts may be virtually identical to that of federal and state courts, as was true in this case. Therefore, the significance of the Sixth Circuit's refusal to enforce repose when respondent elected to pursue his claims under the formal adjudicative procedure established by state law—and then failed to pursue judicial review provided by

state law—goes far beyond the particular facts and parties in this case. It calls into serious question the validity of the modern model of administrative procedure as a mechanism for resolution of disputes, especially disputes between employers and employees.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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No. 84-5692

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ROBERT B. ELLIOTT,
Plaintiff-Appellant,

v.

THE UNIVERSITY OF TENNESSEE, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Western District of Tennessee

Decided and Filed July 9, 1985

Before: KEITH and MARTIN, Circuit Judges; and
EDWARDS, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Robert B. Elliott appeals from an order of the district court granting summary judgment to the defendants on his claim that the defendants violated his civil rights.

Elliott is a minority employee of the University of Tennessee Agricultural Extension Service. He has been employed by the Service since 1966. On December 18, 1981, the Dean of the Service advised Elliott that he was to be terminated from his job due to inadequate work performance, inadequate job behavior, and incidents of gross misconduct. On December 22, 1981, Elliott filed an

administrative appeal from the Notice of Pending Termination under the Tennessee Uniform Administrative Procedure Act. On January 5, 1982, Elliott filed his federal complaint that forms the basis of the present appeal.

Elliott's federal complaint alleges that in the past he made complaints to University of Tennessee officials regarding racial discrimination in the treatment of black leaders, students, and staff personnel in connection with 4-H club events and a series of racially derogatory acts on the part of University officials. One of Elliott's major complaints was a racial slur made by defendant Coley, a Service livestock judge, at an official Service event.

The federal complaint alleges that following Elliott's complaint regarding the Coley incident, defendants Downen, Luck, and Shearon (University officials) conspired with defendants Murray Truck Lines and Korwin to have Elliott terminated from his job. Elliott recently had complained to Korwin, shop manager at Murray Truck Lines, regarding eight racially insulting signs in windows at Murray Truck Lines' place of business. The complaint alleges that the University officials conspired with Korwin to secure a letter from Korwin accusing Elliott of referring to Mr. Murray as a "white racist" and threatening him. Based on the Korwin letter, Downen placed a letter of reprimand in Elliott's job file.

The complaint also alleges that, because of Elliott's complaint regarding Coley, the University officials conspired with defendants Donnell, Johnson, Smith, Hopper, and Cathey, all of whom were members of the Agricultural Extension Service Committee in the county in which Elliott was employed, to have the Committee recommend to Downen that Elliott be terminated from his job. Two black members of the Committee refused to vote for

Elliott's removal. All five white members, two of whom are related to Coley by marriage, voted for Elliott's removal.

The complaint next alleges that Elliott's immediate Supervisor, Shearon, and other University officials began a harassment campaign by requiring Elliott to produce mileage books when white employees were not subject to the same requirement; unjustifiably finding fault with his work; subjecting him to discriminatory job assignments; attempting to place pretextual supervisory complaints in his personnel file; and falsely accusing him of failure to carry out a specific job assignment.

The complaint alleges that at least one of the individual defendants was aware that Elliott was active in a federal lawsuit seeking to secure the right of blacks to gain membership in exclusively white country clubs in Gibson and Madison County, Tennessee, and that the present defendants' actions were designed in part to punish him for his efforts in that case.

Finally, the complaint alleges that the Service continues to discriminate against black citizens by refusing to implement an effective affirmative action plan; failing to integrate its homemaker demonstration clubs and other educational activities; refusing to integrate its 4-H clubs; refusing to address low minority participation in agricultural programs and community resource development programs; refusing to eliminate discrimination in promotion, training, and continuing education; refusing to eliminate discrimination in the establishment and operation of agricultural extension committees; and permitting discrimination by local white officials against black participants in educational programs.

The complaint seeks certification of a class of "persons in Tennessee who are similarly situated [as Elliott] and/or affected by the policies . . . complained of herein which violate not only the rights of [Service employees] . . . but also the rights of black infant and adult citizens who are intended beneficiaries of [the Service]" The relief requested includes an injunction restraining the University of Tennessee, the Service, the University officials, and the Committee from continuing the discriminatory practices outlined above. Also requested is a preliminary and permanent injunction requiring defendants to cease attempting to discharge, cause the discharge of, or otherwise penalize Elliott on the basis of false allegations and other harassing actions. Finally, the complaint seeks attorneys' fees and one million dollars in damages. The complaint invokes jurisdiction under 28 U.S.C. §§ 1331 and 1341. Claims are asserted under 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000d and e and under the first, thirteenth, and fourteenth amendments.

On January 19, 1982, the court entered a temporary restraining order prohibiting the defendants from taking any personnel action against Elliott. On February 23, 1982, the court withdrew the restraining order to permit the parties to proceed through the state administrative appeals process. The court emphasized that the withdrawal of the restraining order did not "in any fashion adjudicat[e] the merits of this controversy."

After dissolution of the restraining order, the parties proceeded through the Tennessee administrative review process. The contested case provisions of the Tennessee Code provide for determination of the issues by an administrative judge who must be an employee of the affected agency or of the office of the secretary of state. Tenn. Code Ann. § 4-5-102(1) & (4). A party may move to

disqualify an administrative judge for "bias, prejudice, or interest," Tenn. Code Ann. § 4-5-302(a), the administrative judge may not be a person who has been involved in the investigation or prosecution of the case, Tenn. Code Ann. § 4-5-303(a), and the administrative judge may not receive ex parte communications, Tenn. Code Ann. § 4-5-304(a). The parties have the right to be represented by counsel, Tenn. Code Ann. § 4-5-305(b), to receive notice of the hearing, Tenn. Code Ann. § 4-5-307(a), to file pleadings, motions, briefs, and proposed findings of fact and conclusions of law, Tenn. Code Ann. § 4-5-308(a) & (b), to request the administrative judge to issue subpoenas, Tenn. Code Ann. § 4-5-311(a), and to examine and cross-examine witnesses, Tenn. Code Ann. § 4-5-312(b). The administrative judge is bound by the civil rules of evidence except that evidence otherwise not admissible may be relied upon if it is "of a type commonly relied upon by reasonably prudent [people] in the conduct of their affairs." Tenn. Code Ann. § 4-5-313(1). An order issued by an administrative judge must include conclusions of law and findings of fact. Tenn. Code Ann. § 4-5-314(c). An initial appeal from an adverse decision by the administrative judge is to the agency itself or to a person designated by the agency. Tenn. Code Ann. § 4-5-315(a). Judicial review of the final agency decision may be had by filing a petition for review in the state chancery court within sixty days of entry of the agency's order. Tenn. Code Ann. § 4-5-322(b). The chancery court sits without a jury and is limited to a review of the administrative record to determine whether the agency decision is in violation of constitutional or statutory provisions or is arbitrary, capricious, or unsupported by substantial evidence. Tenn. Code Ann. § 4-5-322(g) & (h). Review of the decision of the chancery court may be had in the Court of Appeals of Tennessee. Tenn. Code Ann. § 4-5-323.

The administrative judge conducted a lengthy hearing in which Elliott's counsel examined nearly one hundred witnesses. The University alleged eight separate instances of poor job performance and sought approval of its decision to dismiss Elliott. Elliott defended against the charges by asserting, *inter alia*, that the accusations against him were racially motivated. The administrative judge issued an order upholding four of the eight charges but denying approval of the dismissal. Instead, the order directed that Elliott retain his position but be transferred to a different county. The decision of the administrative judge concluded that he had no jurisdiction to hear Elliott's claims of civil rights violations. Nevertheless, the claims of racial discrimination were considered "affirmative defenses" to the University's charges, and the administrative judge made the following finding:

An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing charges against employee . . . [was] based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him.

Elliott appealed this decision to the University of Tennessee Vice President for Agriculture, who concluded that the University's actions were not racially motivated and rejected the appeal. Neither Elliott nor the University filed a petition for review in the state courts.

Eighty-four days after entry of the administrative order, Elliott renewed action on his pending federal com-

plaint. Elliott filed a motion for a temporary restraining order to prevent the defendants from transferring Elliott to a different county or, to the extent that Elliott already had been transferred, to restore him to his previous location. Specifically, the motion requested a restraining order because

said decision of the Administrative Law Judge and the agency constituted an abuse of discretion, is contrary to law, and is not supported by reliable, probative, and substantive evidence. Said Administrative Law Judge and agency have demonstrated their unwillingness and/or inability to determine objectively and impartially the constitutional [and federal statutory claims] raised by the Plaintiff in his Complaint and therefore, said decision should be stayed until this Court can make a preliminary determination of the likelihood [of success on the merits] since only this Court can exercise the Article III powers which are peculiarly applicable to those constitutional and Federal claims.

The motion further particularly alleged that the "Administrative Law Judge's and Agency's decision and remedy was . . . unconstitutional and unlawful in wrongfully rejecting said claims of racial discrimination by plaintiff despite clear evidence thereof."

The University of Tennessee opposed the motion for a restraining order and also filed a motion for summary judgment on the underlying complaint. Its memorandum in opposition to Elliott's motion and its motion for summary judgment asserted the same principles. The University claimed that the district court lacked jurisdiction to "review the merits" of the final agency order because by state statute review may be had only in the Tennessee chancery courts and only on timely petition for review.

The University also asserted that principles of res judicata¹ prevented "relitigation" of the claims of racial discrimination in federal court.

Elliott responded to the motion for summary judgment by arguing that to dismiss his federal claims in deference to the final agency order would be to "effectively confer Article III power upon an Administrative Law Judge who is an agent for the U.T. defendants in this case." Elliott concluded that the "Court has absolutely no basis upon which an award of summary judgment to defendants can be predicated."

On May 12, 1984, the district court granted the University's motion for summary judgment. The court adopted the two grounds of decision urged by the University. Although only the University had moved for summary judgment, the court granted summary judgment in favor of all defendants. Elliott then perfected this appeal.

We will assume, for the sake of argument, that Elliott's motion for a temporary restraining order may plausibly be read as asking the court to "review the merits" of the agency order and that Tennessee's procedural prerequisites somehow prevented a federal court from granting the re-

1.

Res judicata encompasses two forms of preclusion, claim preclusion under which "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action," *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981), Restatement (Second) of Judgments § 24 (1982), and issue preclusion, under which a decision precludes relitigation of the same issue on a different cause of action between the same parties once a court decides an issue of fact or law necessary to its judgment.

Duncan v. Peck, 752 F.2d 1135, 1138 (6th Cir. 1985). Throughout this opinion, we will intend "res judicata" and "rules of preclusion" to refer to principles of both issue and claim preclusion.

straining order. Making those assumptions, the most that can be said is that the court should not have granted a restraining order. That denial of relief, however, would not affect the viability of Elliott's underlying complaint.

Elliott's complaint does not ask for "review" of a state agency order. It asks for an injunction to prevent the defendants from discharging him or "otherwise penaliz[ing] him pursuant to false allegations of inadequate job performance." The complaint also seeks one million dollars in damages. Elliott did not invoke the court's jurisdiction under the administrative review provisions of the Tennessee Code. He unambiguously invoked the jurisdiction of the federal courts pursuant to 28 U.S.C. § 1331 and 1343 and asserted claims under 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988, 2000d and e and under the first, thirteenth, and fourteenth amendments.²

Because Elliott's complaint does not ask for "review" of the agency order but does ask for a de novo federal determination that arguably could undermine the validity of the state order, the court correctly noted that an issue of res judicata arises. The court's analysis of the res judicata issue consisted of the following:

2. The University's argument regarding the effect of the Tennessee review provisions may plausibly be read as an implicit articulation of the argument that the existence of a state remedy precludes resort to section 1983. That argument was rejected by the Supreme Court more than twenty years ago. See *Monroe v. Pape*, 365 U.S. 167 (1961); see also *Chandler v. Roudebush*, 425 U.S. 840 (1976) (Title VII plaintiff who has pursued administrative remedies is entitled to trial de novo in federal court; *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies is not a prerequisite to maintenance of a section 1983 action). Justice Frankfurter's dissent in *Monroe* took issue with the majority's principle, but his view has been resuscitated, in a constitutionalized form, only in the area of procedural due process. See *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, U.S., 104 S. Ct. 3194 (1984); see also *Wagner v. Higgins*, 754 F.2d 186, 193 (6th Cir. 1985) (Contie, J., concurring) (*Parratt* does not apply to violation of substantive constitutional rights).

This Court is convinced that the civil rights statutes set forth in Title 42 of the United States Code . . . were not intended to afford the plaintiff a means of relitigating what plaintiff has heretofore litigated over a five-month period. Therefore, this Court should dismiss the case upon the doctrine of *res judicata*.

Unfortunately, the parties failed to advise the court of several cases which have rejected that position. In *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1982), the Court considered the relationship between the guarantee of a trial de novo in Title VII actions³ and the principles of *res judicata* and federal-state comity as embodied in 28 U.S.C. § 1738. The Court held:

No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action. . . . While we have interpreted the "civil action" authorized to follow consideration by federal and state administrative agencies to be a "trial de novo," *Chandler v. Roudebush*, 425 U.S. 840 (1976), . . . neither the statute nor our decisions indicate that the final judgment of a state court is subject to redetermination at such a trial.

Id. at 469-70 (emphasis in original). In a footnote that accompanied this passage, the Court made explicit that which was implicit in its emphasis on the phrase "final judgment of a state court."

3. The University makes the argument that "this is not a Title VII action" because, the University contends, Elliott's federal court complaint was untimely and he has not received a right to sue letter. Elliott asserts that the complaint was timely and that he has received a right to sue letter. For purposes of this appeal, we must treat this action as a Title VII action because the complaint unambiguously invokes Title VII and because the district court made no finding or conclusion with respect to timeliness or Elliott's receipt of a right to sue letter.

EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions. . . . Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that decisions by the EEOC do not preclude a trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a state's own courts.

Kremer, 456 U.S. at 470 n.7. The Court thus drew a sharp distinction between state court judgments, which are entitled to deference under the *res judicata* principles of section 1738, and unreviewed state administrative determinations which are not. *See also id.* at 487 (Blackmun, J., with Brennan & Marshall, JJ., dissenting) (recognizing distinction made by majority); *id.* at 508-09 (Stevens, J., dissenting) (same). That is precisely the distinction that this court drew in *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972), which was cited with approval by the majority in *Kremer*.

The University recognizes, as it must, the general principle established by footnote 7 in *Kremer*. That principle, however, is not to be applied, the University argues, when the unreviewed administrative decision was rendered by an agency that is authorized to grant full relief, such as reinstatement and backpay, and that provides the litigants with elaborate adjudicative procedures. The University finds support for this argument in two aspects of the *Kremer* opinion. First, the University argues that the Court in footnote 7 implicitly equated "state administrative agency" with an agency that possesses powers sim-

ilar to those possessed by the federal Equal Employment Opportunity Commission. Because the Commission has exclusively administrative rather than adjudicatory authority, the argument goes, the rule of non-preclusion announced in footnote 7 may be applied only to the unreviewed decisions of agencies that possess only administrative authority. Second, the University notes that in footnote 26 of *Kremer*, the Court cites *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), which states that res judicata principles apply to the decision of an administrative agency acting in "a judicial capacity." This citation is said to bolster the University's proposed distinction between the res judicata effect to be given the decision of an agency acting in a judicial versus an administrative capacity.

Both rationales for the University's distinction are without merit. First, the *Kremer* Court itself made plain in footnote 7 that its rule of non-preclusion with respect to unreviewed state administrative decisions applies to the decisions of those agencies that have full enforcement authority and provide full adjudicative procedures as well as to the decisions of agencies that lack those attributes. The Court cited four lower court decisions in support of the rule that it announced. Of those four cases, three approved a rule of non-preclusion even though the state agency had full enforcement authority and provided elaborate adjudicative procedures. See *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978); *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972). The Court in *Kremer* certainly did not have in mind, in footnote 7, the distinction urged by the University.

The University is also unaided by footnote 26. The context of the Court's citation of *Utah Construction* makes

evident that the Court did not intend to adopt the University's proposed distinction. The Court cited *Utah Construction* in the course of stating that the New York administrative procedure, in combination with state judicial review of the administrative decision, did not offend due process. Thus, the citation of *Utah Construction* was in the context of a factual situation—a reviewed administrative decision—different from that implicated in the rule of non-preclusion announced in footnote 7—an unreviewed administrative decision. The citation also was made in the context of a legal issue—whether the procedures offend due process—different from that implicated in footnote 7—whether res judicata should apply. Footnote 26 in *Kremer* thus lends no support to the University's argument.

Finally, we note that in a post-*Kremer* Title VII decision this Court refused to give preclusive effect to the unreviewed decision of a state administrative agency that possessed the attributes which the University argues should exempt the agency from the dictates of *Kremer*. See *Smith v. United Brotherhood of Carpenters and Joiners*, 685 F.2d 164, 168 (6th Cir. 1982). No argument advanced by the University has encouraged us to deviate from that decision.

The district court's holding that Elliott's Title VII claim is barred by res judicata must fall in light of the unambiguous principle enunciated in *Kremer*. The more difficult question is whether the court erred in dismissing Elliott's claims asserted under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988. We conclude that the court erred in dismissing those claims.⁴

4. Throughout the remainder of this opinion, we will refer primarily to the claims asserted under section 1983. Our reasoning and conclusion apply equally to the other statutory claims asserted by Elliott.

In *Loudermill v. Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983), *aff'd*, U.S., 105 S. Ct. 1487 (1985), we held that an unreviewed state administrative adjudication has no claim preclusive effect in a subsequent section 1983 action in federal court. *Id.* at 559. In dictum, the *Loudermill* panel majority drew a distinction between the claim preclusive effect and the issue preclusive effect of a prior, unreviewed state administrative adjudication, stating that such an adjudication should be accorded issue preclusive effect in section 1983 actions in federal court. *See id.* at 559 n.12. The court cited *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), to support its view with respect to issue preclusion.

Utah Construction does not support the broad principle advanced in dictum in *Loudermill*. The *Utah Construction* Court stated:

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

384 U.S. at 422. This language certainly lends support to the view advanced in *Loudermill*. That language, however, must be read in its proper context. *Utah Construction* involved the collateral estoppel effect to be given a decision of the federal Advisory Board of Contract Appeals in a subsequent action in the Court of Claims. *See* 284 U.S. at 400. The Court did not address the deference that federal courts should give to the unreviewed findings

of state administrative agencies in subsequent federal civil rights actions.⁵

The question whether a prior, unreviewed determination of a state administrative agency must be given preclusive effect in a subsequent federal civil rights action is a difficult issue that requires a careful analysis of Supreme Court teachings. The starting point for this analysis is *Allen v. McCurry*, 449 U.S. 90 (1980) and *Migra v. Warren City School District Board of Education*, U.S., 104 S. Ct. 892 (1984). These cases held that a federal court adjudicating a section 1983 action must accord the same preclusive effect to the decision of a state court as the decision would be accorded by other courts of that state. Neither *Allen* nor *Migra*, however, requires that we give preclusive effect to the unreviewed findings of a state administrative agency. Although *Allen* and *Migra* recognized that the purpose of section 1983 was to provide a civil rights claimant with a federal right in a federal forum, the Court concluded that the legislative history of section 1983 was not so unequivocal as to effect an

5. All of the cases the Court in *Utah Construction* cited in support of its proposition involved the application of preclusion principles to the prior determinations of federal agencies. *See* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (decision of the National Bituminous Coal Commission); *Hanover Bank v. United States*, 285 F.2d 455 (Ct. Cl. 1961) (decision of the Tax Court); *Fairmont Aluminum Co. v. Commissioner*, 222 F.2d 622 (4th Cir. 1955) (same); *Seatrail Lines, Inc. v. Pennsylvania R. Co.*, 207 F.2d 255 (3d Cir. 1953) (decision of Interstate Commerce Commission). The Court included a "see also" cite to a diversity case that applied preclusion rules to the decision of a private arbitration panel. *See* *Goldstein v. Doft*, 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd*, 353 F.2d 484 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966).

For the reasons noted earlier in this opinion, we do not believe the Court at footnote 26 of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), meant to authorize the application of *Utah Construction* to the unreviewed decisions of a state administrative agency when the claimant subsequently asserts a federal right in a federal court.

implied repeal of 28 U.S.C. § 1738 and the common law rules of preclusion that section 1738 directed the federal courts to respect. See *Allen*, 449 U.S. at 99; *Migra*, 104 S. Ct. at 897.

The conflict between section 1983 and section 1738 that the Court resolved in *Allen* and *Migra* is not present when a federal court considers whether to give preclusive effect to the unreviewed findings of a state administrative agency. Section 1738 provides in relevant part:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

The "Acts, records and judicial proceedings" referred to in the statute are the "Acts of the legislature of any State" and the "records and judicial proceedings of any court of any such State," 28 U.S.C. § 1738 (emphasis added). The statute does not require federal courts to defer to the unreviewed findings of state administrative agencies. See *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 361 n.6 (4th Cir. 1985); *Moore v. Bonner*, 695 F.2d 799, 801 (4th Cir. 1982); see also *Gargiul v. Tompkins*, 704 F.2d 661, 667 (2d Cir. 1983), *vacated on other grounds*, _____ U.S. _____, 104 S. Ct. 1263, *on remand*, 739 F.2d 34 (1984);⁶ *Patsy v. Florida International University*, 634 F.2d 900, 910 (5th Cir. 1981) (en banc), *rev'd on other grounds sub nom. Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 n.1 (2d Cir. 1978) (per curiam); *Mauritz v. Schwind*, 101 S.W.2d 1085, 1089-90 (Tex. Civ. App. 1937). Cf. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281-83 (1980)

6. See footnote 9 *infra*.

(plurality opinion) ("[T]he critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.")⁷

The conclusion that section 1738 does not require that we give preclusive effect to the findings of a state administrative agency does not end the inquiry. Common law principles may require that we apply rules of preclusion. See *McDonald v. City of West Branch*, _____ U.S. _____, 104 S. Ct. 1799, 1802 (1984). In determining whether to create or apply a judge-made rule of preclusion in the circumstances presented by this case, it is appropriate to consider the question in light of the legislative history and purpose of section 1983.

7. The Court in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) (plurality opinion), ultimately held that "Full faith and credit must be given [by the District of Columbia] to the determination that the Virginia [Workers' Compensation] Commission had the authority to make" *Id.* at 282-83. It is unclear whether the Court believed this result was required by the full faith and credit clause of the Constitution, Art. IV, § 1, or the full faith and credit statute, 28 U.S.C. § 1738. The full faith and credit clause requires each state to give full faith and credit to the "judicial Proceedings" of another state. The full faith and credit statute requires every court within the United States to give full faith and credit to the judicial proceedings of any court of another state. Although the *Thomas* Court cited section 1738, the Court's substantive discussion focused on the full faith and credit clause, *Id.* at 279, and on the applicable "constitutional rules," *id.* at 282. The Court therefore must have: (1) regarded the District of Columbia as a "state" subject to both the full faith and credit clause and the full faith and credit statute; or (2) not considered or ruled on the difference in language in the clause and the statute. If the former, the *Thomas* case is inapplicable here because a federal court is bound only by the statute, which requires that we give full faith and credit only to the judicial proceedings of state courts. If the latter, we are unaware of any dispositive Supreme Court decision. We therefore adopt the rule clearly articulated by the Fourth Circuit.

In *Allen* and *Migra*, the Court stated in dictum that the legislative history and purpose of section 1983 could not override "traditional rules of preclusion." See *Allen*, 449 U.S. at 99; *Migra*, 104 S. Ct. at 897. We do not believe that the Court's language may be read to prevent consideration of the history and purpose of section 1983 when a court is considering not whether to override a common law rule of preclusion but whether to develop such a rule in the first instance. See *McDonald v. City of West Branch*, _____ U.S. _____, _____, 104 S. Ct. 1799, 1803, 1804 (1984).

As noted previously, the Supreme Court has stated that common law principles of res judicata may be applicable when an administrative agency "is acting in a judicial capacity." See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). The rule in *Utah Construction* has been applied primarily to the administrative decisions of federal agencies when principles of res judicata are asserted in a subsequent federal court proceeding. Rarely have courts considered whether a state administrative decision is entitled to preclusive effect when a claimant asserts a federal right in a subsequent federal action other than one based upon section 1983. Consequently, the question is not whether section 1983 can override an existing common law rule of preclusion, but whether we ought now to develop and apply such a rule in a section 1983 action.

The legislative history and purpose of section 1983 has been summarized by the Supreme Court:

The legislative history [of section 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created

rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

... The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." *Ex parte Virginia*, 100 U.S. [339, 346 (1879)].

Mitchum v. Foster, 407 U.S. 225, 242 (1972). This view of the legislative purpose of section 1983 echoed the view expressed in *Monroe v. Pape*, 365 U.S. 167 (1961):

It was not the unavailability of state remedies but the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind [section 1983].

....

... It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 174-75, 180 (emphasis added). The legislative history and purpose of section 1983, as explicated by the Supreme Court, is incompatible with application of a judicially fashioned rule of preclusion that would bind a

court considering a section 1983 claim to the unreviewed findings of a state administrative agency. Congress provided a civil rights claimant with a federal remedy in a federal court, with federal process, federal factfinding, and a life-tenured judge. The Court in *Allen* and *Migra* did not disagree with the reading of the legislative history and purpose of section 1983 as explained in *Mitchum v. Foster* and *Monroe v. Pape*. See *Allen*, 449 U.S. at 98-99; *Migra*, 104 S. Ct. at 897. The conflict that animated the decisions in *Allen* and *Migra*—the conflict between section 1983 and section 1738 and common law rules of preclusion—is not present when the prior adjudication was conducted in a state administrative agency rather than a state court. In the absence of such a conflict, we decline to undermine the purpose of section 1983 by creating a rule that would give preclusive effect to the prior, unreviewed decision of a state administrative agency.

At least implicit in the legislative history of section 1983 is the recognition that state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court. State administrative decisionmakers, unlike federal judges, generally do not enjoy life tenure. Because they are subject to immediate political pressures from which federal judges are immune, state administrative decisionmakers encounter more difficulty in achieving the broad perspective necessary to approach sensitively the issues raised by those whose claims often are dramatically anti-majoritarian. The importance of access to a decisionmaker who is insulated from majoritarian pressure is particularly important in those fact-intensive cases, such as race discrimination cases, in which factual findings of motive and intent play major roles in the litigation.

Of course, this argument has been rehearsed before in the context of the debate over the forum allocation decision as between federal and state courts. See Neuborne, *The Myth of Parity*, Harv. L. Rev. 1105 (1977). The argument is no less valid for being repeated here. Although similar arguments for denying res judicata effect to state court judgments were rejected in *Allen* and *Migra*, that rejection, as we have noted, was based upon the congressional directive embodied in section 1738. That directive is not applicable here, and the very real differences between a state and federal forum legitimately play a role in the decision whether to create a rule that would give preclusive effect to the unreviewed findings of a state administrative agency.

Moreover, there are significant differences between the state judicial and administrative forums that counsel against federal court deference to the decisions of the latter even though Congress has required deference to the decisions of the former. Primary among these differences is the process for selecting the decisionmaker. State court judges, like federal judges, have been selected through a political process that places a premium on the candidate's ability to make difficult choices in the face of competing, often irreconcilable, highly desirable goals. In antiquarian terms, the political selection process places a premium on the candidate's practical judgment. By contrast, the process for selecting administrative decisionmakers is bureaucratic rather than political. As a result, the selection process places a premium on technical competence, narrowly conceived, rather than practical judgment. The candidate generally is expected to apply one regulatory scheme to a narrow range of possible factual situations. Consequently, the administrative decisionmaker, unlike the state or federal judge, is not selected

on the basis of his or her ability to apply a broad range of principles to an ever-broadening range of social conflicts and to exercise the practical judgment necessary to reach a just result in a particular constitutional case. Although an agency decision generally is subject to review in the state's courts, the deferential standard of review employed is not adequate fully to protect federal rights in light of the often fact-intensive nature of the constitutional inquiry.

The differences between the nature of the state administrative and federal judicial forums compel us to conclude that, regardless of the similarities in the formal procedures used in those forums, according preclusive effect to unreviewed state administrative determinations is incompatible with the full protection of federal rights envisioned by the authors of section 1983.

Our discussion of the differences between administrative and judicial forums should not be read as doubting the worth of state administrative determination of civil rights issues. Our rule ultimately is one that encourages resort to speedy, efficient state administrative remedies and thus maximizes the choices of forum available to the litigants. If the claimant prevails before the administrative agency, the defendant may appeal to the state courts and thus, pursuant to the rule in *Allen*, *Migra*, and *Kremer*, preclude federal court intervention. If the claimant loses before the agency, the claimant may either pursue an appeal in the state courts or bring an action in federal court. The rule of non-preclusion maximizes the forum choices by encouraging the claimant to pursue administrative remedies when, if rules of preclusion were applicable, the claimant would forego the administrative adjudication and proceed immediately to federal court. See *McDonald v. City of West Branch*, U.S., 104 S. Ct.

1799, 1804 n.11 (1984); *Gargiul v. Tompkins*, 704 F.2d 661, 667 (2d Cir. 1983), *vacated on other grounds*, U.S., 104 S. Ct. 1263, *on remand*, 739 F.2d 34 (1984);⁸ *Moore v. Bonner*, 695 F.2d 799, 802 (4th Cir. 1982). Of course, it is the province of Congress, not the courts, to make forum allocation decisions. When the issue comes to us in the form of the question whether to create a common law rule of preclusion, we have no choice but to make the decision that best comports with reason and the relevant statutory scheme. As we have shown, the legislative history of section 1983 supports, if it does not compel, the result we reach.

A rule denying preclusive effect to an unreviewed state administrative determination in a subsequent section 1983 action also has the salutary effect of preserving congruence between the rules of preclusion in Title VII and section 1981 (or 1983) actions. Claims under these statutes often are asserted in the same lawsuit. The Supreme Court has made clear that an unreviewed state administrative determination will not preclude later resort to Title VII, and we can find no reason why a different rule should apply to claims under section 1981 or 1983. One commentator has observed:

Application of preclusion as to part of the case saves no effort, does not prevent the risk of inconsistent findings, and may distort the process of finding the issues. The opportunity for repose is substantially weakened by the remaining exposure to liability. Insistence on preclusion in these circumstances has little value, and more risk than it may be worth.

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4471 at 169 (Supp. 1985). Although

8. See footnote 9 *infra*.

this rationale for a rule of non-preclusion applies only when a section 1981 or 1983 claim is asserted together with a Title VII claim, the joining of those claims occurs in a non-trivial number of cases.

The decision we reach today is at odds with the result reached in other circuits; the existing plethora of views on the issue makes conflict inevitable. See, e.g., *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985) (giving preclusive effect to a state administrative determination on authority of *Utah Construction*); *Gargiul v. Tompkins*, 704 F.2d 661, 667 (2d Cir. 1983) (not giving preclusive effect to a state administrative determination because the claimant had not "cross[ed] the line between state agency and state judicial proceedings"; citing *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 n.1 (2d Cir. 1978)), *vacated on other grounds*, U.S., 104 S. Ct. 1263, *on remand*, 739 F.2d 34 (1984);⁹ *Moore v. Bonner*, 695 F.2d 799, 801-02 (4th Cir. 1982) (not giving preclusive effect to state administrative determination because contrary rule would encourage claimants to bypass agency remedies); *Steffen v. Housewright*, 665 F.2d 245, 247 (8th Cir. 1981) (per curiam) (purporting to give preclusive effect to state administrative determination, but holding that agency's find-

9. The Supreme Court vacated *Gargiul* and remanded the case in light of *Migra*. On remand, the Second Circuit panel held, without analysis, that *Migra* barred all the claims asserted by the plaintiff. We believe that the principle for which we cite the original panel opinion in *Gargiul* is still good law. The original panel had held, in addition to the principle for which we cite the case, that a prior state court proceeding does not bar federal court consideration of constitutional claims not actually litigated and determined in the state court proceeding. It is the latter principle that was rejected by the Court in *Migra* and for which the original *Gargiul* opinion was most likely vacated. There is nothing in *Migra* to cause the panel on remand to have questioned its holding with respect to an unreviewed state administrative decision.

ings may be disregarded if they are "clearly erroneous"); *Patsy v. Florida International University*, 634 F.2d 900, 910 (5th Cir. 1981) (en banc) (stating that state administrative determinations "carry no res judicata or collateral estoppel baggage into federal court"), *rev'd on other grounds sub nom. Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Anderson v. Babb*, 632 F.2d 300, 306 n.3 (4th Cir. 1980) (per curiam) (not giving preclusive effect to a state administrative determination because of the "deliberately intended political composition of the tribunal"); *Taylor v. New York City Transit Authority*, 433 F.2d 665, 670-71 (2d Cir. 1970) (giving preclusive effect to state administrative determination on authority of workers' compensation cases decided on the basis of full faith and credit clause). The analysis used and result reached in this opinion attempt to make sense of a complex area of the law and to remain faithful to both the teachings of the Supreme Court and the intent of Congress as manifested in section 1983 and its history.

The judgment of the district court is reversed.

In light of this disposition, the appellees' requests for attorneys' fees and costs for defense of a frivolous appeal are denied. Elliott shall recover the costs of this appeal.

(Filed May 12, 1984)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

No. 82-1014

ROBERT B. ELLIOTT,
Plaintiff,

vs.

THE UNIVERSITY OF TENNESSEE, ET AL.,
Defendants.

**MEMORANDUM DECISION ON DEFENDANTS'
AMENDED MOTION FOR SUMMARY JUDGMENT**

This is an action for preliminary and permanent injunctive relief and \$1,000,000.00 in damages pursuant to 42 U.S.C. §1983, and Title VI and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000(e), *et seq.*, brought by Robert B. Elliott, a nontenured faculty member with the rank of Associate Agricultural Extension Agent of The University of Tennessee's Agricultural Extension Service (AES), now assigned to its Shelby County office.

Plaintiff alleges that defendants have violated his civil rights on the basis of race, 42 U.S.C. §1981, and have conspired to deprive him of civil rights under 42 U.S.C. §§1985 and 1986. In addition to his individual action, plaintiff seeks to have this action certified and maintained as a class action for which he seeks injunctive and declaratory relief from discrimination on the basis of race.

When the plaintiff filed this action in December of 1981, the dean of the AES had written to plaintiff stating that a due process hearing would be conducted under the Contested Case Provisions of the Tennessee Uniform Administrative Procedures Act (UAPA), T.C.A. §4-5-301, *et seq.*, to determine whether or not plaintiff's employment should be terminated on the basis of gross misconduct, inadequate work performance, and improper job behavior. Because this action was filed prior to any due process hearing in this employment disciplinary matter, the University defendants moved the Court to dismiss on the basis, *inter alia*, that this civil rights action was premature and was not ripe for judicial review.

Initially, this Court entered a temporary restraining order which was lifted later by Judge Wellford on March 29, 1982, when he ruled that the defendants would not be restrained from taking job action against plaintiff, including termination, after a full and adequate hearing.

After dissolution of the temporary restraining order, a UAPA hearing was convened in Jackson, Tennessee, on April 26, 1982. It continued with various recesses until its conclusion five months later on September 29, 1982. The administrative record consists of 55 volumes of transcript containing over 5,000 pages of the testimony of over 100 witnesses and 153 exhibits. Plaintiff's employment has never been interrupted and the final UAPA order requires that plaintiff's employment continue.

The initial order of the Administrative Law Judge (ALJ), a ninety-six-page document containing extensive findings of fact and conclusions of law, was entered on April 4, 1983, in accordance with T.C.A. §4-5-314(b). It ruled that the agency proved four of the eight charges filed against plaintiff, but failed to prove four of the

charges. The ALJ also ruled that the plaintiff failed to prove, as a defense, that the defendants' motive in seeking plaintiff's discharge was racial.

Instead of ordering that plaintiff be terminated, the ALJ ordered that the employee be reassigned to a different work station for a one-year period and that plaintiff be given new supervisors. Previously, plaintiff was assigned in the Madison County Office of the AES under the supervision of the Extension Leader, Curtis Shearon.

Both plaintiff and the agency filed petitions for reconsideration of the initial order, which were overruled. Thereafter, plaintiff appealed the initial order, pursuant to T.C.A. §4-5-315, to Dr. W. W. Armistead, University of Tennessee Vice President for Agriculture, who, on August 1, 1983, filed the final order in the UAPA case. Dr. Armistead affirmed and incorporated the initial order by reference and held, in part:

My review of the record [the ALJ ruling] in this case convinces me that it is supported by the evidence, and that no error was committed by the Administrative Judge in reaching such decision. I am also convinced from my review of the record that the action of the Extension Service in proposing the termination of employee's services was not motivated by employee's race but by a desire to terminate employee for what the Extension Service sincerely believed to be inadequate job performance and inadequate job behaviour. The lengthy due process hearing afforded employee and the lengthy hearing record, which has been filed with me, are ample evidence of such fact. [Attachment C, Plaintiff's Motions].

In accordance with such final order, plaintiff, on August 31, 1983, was transferred for one year to Shelby

County. Plaintiff was not reclassified but remains in his same status as a nontenured faculty member, with the same rank, same salary, and same benefits as before. The only change ordered by the final order was a change of work station for one year and a change of supervisors, approximately 80 miles distance from his former station.

Plaintiff did not seek a stay of the final order from Vice President Armistead, even though such stay is provided for in the UAPA, T.C.A. §4-5-316. More significantly, plaintiff did not seek judicial review of the UAPA final order under T.C.A. §4-5-322, which requires that a petition for judicial review must be filed in chancery court within 60 days after the entry of the final order.

Instead, plaintiff delayed eighty-four days after entry of the final order and filed the pending action in this Court, a petition for a TRO and preliminary injunction or, alternatively, a stay of the final agency order almost two months after plaintiff's transfer to Shelby County was complete and effective, in an attempt to restrain what had already occurred.

Plaintiff attacks the merits of the August 1, 1983 final UAPA agency order, claiming that the final administrative order is arbitrary, retaliatory, wrongful, illegal, harassing, unnecessary and damaging to his reputation. However, since plaintiff did not appeal timely to the proper court, the merits of the August 1, 1983 final order are not reviewable here in this Court and that proceeding is *res judicata* to any attack on the merits of that order in this, or any other, court.

It is defendants' position that summary judgment is proper in favor of the University of Tennessee defendants for the following reasons.

1. In so far as the plaintiff seeks to have this Court serve as an appellate tribunal over the UAPA hearing, this Court lacks appellate jurisdiction to review the merits of the final order of the UAPA hearing which ruled upon the same issues present in this case. Jurisdiction for judicial review of a final UAPA order is vested in the Tennessee chancery courts under T.C.A. §4-5-322.

2. The final order of August 1, 1983 is *res judicata*, which bars any attempt to attack the merits of that order.

Exclusive jurisdiction to judicially review the merits of a final order entered in a UAPA contested case is in the Tennessee chancery courts. *United Inter-Mountain Telephone Company v. Public Service Commission*, 555 S.W.2d 389 (Tenn. 1977): T.C.A. 4-5-322(a).

It is a hornbook principle that judicial review of the merits of a final administrative decision is proper only in accordance with the statute which provides for judicial review. Plaintiff's post administrative hearing motions for a TRO, a stay of the UAPA final order, and preliminary injunction are obvious efforts to attack the merits of this UAPA contested case decision and should have been filed, if at all, in chancery court within the prescribed 60-day period. The final agency order so stated:

A petition for reconsideration of this order may be filed within ten (10) days after entry, as set forth in T.C.A. §4-5-317. Judicial review of such order may be had by filing a petition for review in a Chancery Court having jurisdiction within sixty (60) days of this order, as provided by T.C.A. §4-5-322.

Plaintiff deliberately chose to contest the disciplinary charges against him by means of a UAPA contested case

in accord with T.C.A. §4-5-301, *et seq.* Having invoked the due process provisions of the UAPA through a final agency order, plaintiff was required to follow the requirements of the Tennessee law to review the administrative final order.

Moreover, even in a proper case where federal courts have jurisdiction, the federal courts are not the proper forum to review the merits of an administrative disciplinary proceeding against a government employee. *Gross v. University of Tennessee*, 448 F.Supp. 245 (W.D. Tenn. 1978), *aff'd*, 620 F.2d 109 (6th Cir. 1980).

Plaintiff makes no claim of denial of procedural due process. Nor can he in light of the long exhaustive evidentiary hearing in which plaintiff presented more than ninety witnesses, and cross-examined some of the agency's witnesses for more than thirty hours each. Plaintiff clearly has received full protection in this due process hearing, as required in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972).

That this court simply is the wrong place to attack such a transfer of job location or change of supervisors was made clear by the United States Supreme Court in *Bishop v. Wood*, 426 U.S. 349 (1976). In *Ramsey v. TVA*, 502 F.Supp. 230, 232 (E.D. Tenn. 1980), the court said:

This Court is not designed to sit in judgment of personnel decisions best left to those with expertise in personnel matters and familiarity with the workings and problems of the agency concerned.

Having demonstrated that this Court is not the forum in which the plaintiff may seek appellate review of the administrative ruling, the Court now wishes to treat the question pertaining to *res judicata*.

When plaintiff first filed this case, the personnel disciplinary hearing by the administrative agency had not been conducted. Plaintiff, therefore, sought to forestall the administrative hearing upon his alleged misconduct and he sought class relief whereby the Court would investigate and supervise all phases of employment relations in the AES, similar to the school desegregation cases. When injunctive relief against the disciplinary proceedings was denied in this court, plaintiff litigated in the UAPA proceeding all of the issues about which he now complains, including allegedly racially discriminatory conduct by his employers. As heretofore noted, the final disciplinary order was appealable to courts of record in the court system of Tennessee.

This Court is convinced that the civil rights statutes set forth in Title 42 of the United States Code, and upon which plaintiff relies for this Court's jurisdiction, were not intended to afford the plaintiff a means of relitigating what plaintiff has heretofore litigated over a five-month period. Therefore, this Court should dismiss the case upon the doctrine of *res judicata*.

For the above reasons, this Court concludes that a summary judgment should be granted in favor of all defendants and the Clerk is directed to enter a judgment of dismissal with prejudice in favor of all defendants.

ENTER: This 2nd day of May, 1984.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr.
United States District Judge

THE UNIVERSITY OF TENNESSEE

OFFICE OF THE VICE

PRESIDENT FOR

AGRICULTURE

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veterinary medicine

Research, extension in home economics

August 1, 1983

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The University of Tennessee

810 Andy Holt Tower

Knoxville, Tennessee 37996-0184

Re: *The University of Tennessee Agricultural Extension Service v. Robert B. Elliott*

Dear Sirs:

This decision constitutes the final order in this matter and is entered pursuant to T.C.A. § 4-5-315.

The initial order, entered on April 4, 1983 by the Administrative Judge, concluded that although Mr. Elliott was guilty of four of the eight charges placed against him, he should not be terminated as proposed by the Extension Service. Instead, the employee was ordered reassigned for a twelve month period under the direct supervision of the District and Associate District Supervisors of Dis-

trict One. "Placing employee under District One supervision precludes transfer to "virtually any county in the State," as employee contends. To the extent such order can be otherwise construed, it is modified accordingly. Such action will insure that employee remain in District One. In ordering such a transfer, the Administrative Judge recognized the fact that it would be difficult, if not impossible, for Mr. Elliott and his present supervisor, Mr. Curtis Shearon, to work together in a harmonious relationship in the Madison County Agricultural Extension Office.

My review of the record in this case convinces me that such conclusion is undoubtedly true, is supported by the evidence, and that no error was committed by the Administrative Judge in reaching such decision. I am also convinced from my review of the record that the action of the Extension Service in proposing the termination of employee's services was not motivated by employee's race but by a desire to terminate employee for what the Extension Service sincerely believed to be inadequate job performance and inadequate job behaviour. The lengthy due process hearing afforded employee and the lengthy hearing record, which has been filed with me, are ample evidence of such fact. It seems to me that the very essence of a due process hearing is to give an employee charged with an offense an opportunity to defend himself of the charges against him. Here, the employee was afforded ample opportunity under the law to defend himself before he was terminated and was found not guilty of four of the eight charges. The Administrative Judge found that conviction of the remaining charges was not sufficient under the circumstances to warrant dismissal. The Extension Service did not appeal such finding and conclusion.

I have considered carefully the issues raised by employee in this appeal and find them to be without merit for the reasons set out in the well-reasoned and detailed initial order of the Administrative Judge, which I adopt as my own and as a part of the final order in this matter. Accordingly, it is my decision to sustain the findings and conclusions of the Administrative Judge as they relate to this appeal and deny employee's appeal.

A petition for reconsideration of this order may be filed within ten (10) days after entry, as set forth in T.C.A. § 4-5-317. Judicial review of such order may be had by filing a petition for review in a Chancery Court having jurisdiction within sixty (60) days from the entry of this order, as provided by T.C.A. § 4-5-322.

Entering this 1st day of August, 1983.

/s/ W. W. Armistead
W. W. Armistead
Vice President

**THE UNIVERSITY OF TENNESSEE
ADMINISTRATIVE APPEAL**

THE UNIVERSITY OF TENNESSEE AGRICULTURAL
EXTENSION SERVICE,

Employer,

v.

ROBERT B. ELLIOTT,
Employee.

INITIAL ORDER

INTRODUCTION

Pursuant to the contested case provisions of the Tennessee Administrative Procedures Act (UAPA), T.C.A. Sec. 4-5-301 et seq., this administrative law judge and hearing examiner (hearing examiner hereafter), an agency staff member having been assigned this role by W. W. Armistead, Vice President for Agriculture The University of Tennessee Institute of Agriculture, conducted a hearing in the above styled case. The hearing was convened on April 26, 1982, in the auditorium of the Madison County Agricultural Complex in Jackson, Tennessee. Employee's motion to continue was denied and testimony was heard on April 26-29, 1982. The hearing recessed and thereafter reconvened on July 13-16, 1982; July 26-28, 1982; August 9-13; 1982; August 16-August 18, 1982 and August 23, 1982 during which day the hearing recessed at the request of employee upon receiving news of the death of his wife's uncle in Chicago, Illinois. The hearing was reconvened September 27-29, 1982 and then recessed until October 25, 1982 at which time employee moved for a continuance

of sixty days based on recommendation of his physician, Dr. Robert Winston, who testified in support of the motion that in his opinion Robert Elliott could carry on a normal work schedule but to continue the stress and strain of the hearing could lead to a stroke and possible paralysis. Dr. Winston, an internist and general practitioner, had earlier testified as a witness for employee. While awaiting a second opinion from neurologist, Dr. James Spruill whom Dr. Winston had called in during the week of October 11, 1982 while employee was hospitalized and under Dr. Winston's care, to evaluate certain tests, the University offered to waive further cross examination of employee and conclude the hearing. Upon agreement of the parties, the motion to recess for 60 days became moot and after twenty-eight days of testimony and argument, the hearing was concluded. Employee's motion for a directed verdict at the conclusion was denied.

After reviewing all the testimony some 104 witnesses all evidence of record which included 159 exhibits, arguments of counsel, and the parties proposed findings of fact and conclusions of law, the following findings of fact and conclusions of law are rendered and an initial order entered accordingly.

The purpose of this hearing was to determine whether or not the employment of Madison County Associate Agricultural Extension Agent, Robert B. Elliott (hereafter Elliott, or employee) should be terminated for alleged inadequate work performance and inadequate and/or improper job behavior.

By letter dated December 18, 1981, Dr. M. Lloyd Downen, (hereafter Downen, employer or Dean) of The University of Tennessee Agricultural Extension Service (hereafter University, employer, UTAES or AES) informed

Elliott that "due to the serious allegations and incidents of inadequate job behavior which have continued this year, I have decided to propose that your employment with The University of Tennessee Agricultural Extension Service be terminated for inadequate job performance and inadequate job behavior". (Exhibit #115). Elliott was notified of his right to a hearing to contest the charges against him either under Section 500 of The University of Tennessee Institute of Agriculture's (UTIA) Personnel Procedures or the contested case provisions of the Tennessee Uniform Administrative Procedures Act (UAPA). On December 22, 1981, the employee informed Downen by letter that he was electing to contest the charges against him in a hearing under the UAPA. Subsequently, Elliott filed a civil rights action in the United States District Court for the Western District of Tennessee seeking damages and both temporary and permanent injunctive relief against the University and its officials from taking any action which would affect his employment status. The court entered a temporary restraining order which enjoined the University from taking any further action towards the commencement of this hearing. Upon dissolution of the temporary restraining order Federal District Judge Harry Wellford specifically allowed this hearing to proceed as long as it was held prior to any determination to terminate Elliott's employment. On March 1, 1982, Downen wrote to employee Elliott (Exhibit #118) specifically charging him as follows:

You are charged with inadequate work performance in that you have failed in a timely and proper manner to complete assignments given to you pursuant to your job description by the Madison County extension leader and failed to properly carry out instructions given to you by your supervisors. You are charged

with inadequate job behavior in that you have played golf during working hours without permission and without taking leave. You are also charged with conducting your personal cabinet business during working hours. You are charged with making, or allowing, harassing phone calls to be made from your home telephone to Mr. Jack Barnett, a resident of Gibson County. You are charged with improper job behavior during the incident at Murray Truck Lines on June 18, 1981 and at the Madison County livestock field day on July 24, 1981. You are charged with violating The University of Tennessee Institute of Agriculture work rule #4, leaving work prior to the end of the work period, and repeated failure to inform the supervisor when leaving a work station or work area. You are charged with violating work rule #13, the use of abusive language. You are charged with violating work rule #24, behavior unacceptable to the University or to the community at large. You are charged with violating work rule #25, insubordination or refusal of an employee to follow instructions or to perform designated work where such regulations or work normally or properly may be required of an employee.

Thereafter, pursuant to the UAPA, T.C.A. Sec. 4-5-101 *et seq.* employee moved for a more definite statement. Employee responded as follows:

1. The employee is charged with playing golf during working hours in that during the spring of 1976 he was caught on the golf course at Woodland Hills Country Club in South Madison County during working hours and without permission by the Madison County extension leader and district supervisor. The employee gave assurance that he would not play golf again during working hours.

Thereafter, on July 31, 1981 the employee, without permission, played golf during working hours at the Jackson Golf and Country Club. Employee is also charged with recently playing golf without receiving prior permission to leave the work station and without making previous arrangements to take annual leave.

2. The employee is charged with engaging in the commercial business of making and installing cabinets during working hours in that the employee in 1980 on numerous occasions visited a residential dwelling in Jackson, Tennessee which was under construction and which the employee had been low bidder on the construction and installation of kitchen cabinets. Such visits to said dwelling were during working hours. The date of the last visit was June 9, 1980. The employee is also charged with other acts of engaging in personal business during working hours, proof of which will be adduced at the hearing of this matter.
3. The employee is charged with making, or allowing to be made, harassing telephone calls to Mr. Jack Barnett, a resident of Gibson County, in that anonymous telephone calls were made at all hours of the day and night to Mr. Barnett's residence, and upon making a complaint to South Central Bell Company, such anonymous calls were traced to the employee's residence telephone in Gibson County. Such charge, if sustained, is alleged to violate work rule #24 of the UTIA in that such activity represents behavior unacceptable to the University or the community at large.

Such anonymous telephone calls were harassing in that such calls were also made in the late-night hours, were repetitive and were the cause of abuse, torment and harassment to the peaceful enjoyment of Mr. Barnett's residence.

4. The employee is charged with improper job behavior during working hours on June 18, 1981 at Murray Truck Lines in Jackson, Tennessee in that one (1) the employee trespassed upon the premises of said truck lines through the back door entrance, (2) refused to identify himself to the shop foreman, (3) used abusive language toward the shop foreman, (4) refusal to identify himself to the owner, (5) refused to leave premises when requested to do so by the owner, and (6) verbally threatened the owner.
5. The employee is charged with improper job behavior at the Madison County livestock field day on July 24, 1981 in that the employee, upon overhearing a conversation of Mr. Tommy Coley, a private citizen of Madison County, placed himself immediately in Mr. Coley's face shouting three times, "wait a goddam minute" or expletives to the same effect; that the employee refused to allow Mr. Coley to explain the misunderstanding; that the employee refused to investigate and determine the correct facts; that the employee left the area cursing profanely; that the employee, without investigating the true facts, wrote to the U.S. Department of Justice claiming that Mr. Coley, in his role as a livestock judge, had refused to award Best Animal to a black youth, when in fact Mr. Coley had awarded Best Animal to a black youth.

6. The employee is charged with violating the UTIA work rule #4, leaving work prior to the end of the work period, in that the employee did not return to the office on the afternoon of July 23, 1981 from the Milan Field Day but rather returned to his home in Gibson County, missing a staff conference. On July 31, 1981, the employee left the office prior to the end of working hours and proceeded to play golf without permission and without taking annual leave. The employee is also charged with other instances of leaving his work station prior to the end of the work period, proof of which will be adduced at the hearing of this matter.
7. The employee is also charged with improper job behavior in violating the UTIA work rule #22, charging personal calls to the extension service telephone in Madison County in that beginning at least in the summer of 1981, the employee began charging long-distance personal calls to the extension service telephone number in Jackson, Tennessee.
8. Employee is charged with violating UTIA work rule #25, insubordination or refusal of an employee to follow instructions or to perform designated work where such instructions or work normally and properly may be required of an employee in that the employee consistently refused to carry out his supervisors instructions for the employee to complete the small farm group surveys and feeder pig producer surveys, and the employee also refused to carry out his assignment in the Cypress Creek Watershed, and other assignments. The employee also failed to appear at

a calf sale on October 8, 1981 even though the employee was working that date.

9. The employee is charged with inadequate work performance in that he failed in a timely and proper manner to complete assignments given to him pursuant to his job description, and failed to carry out instructions given to him by his supervisors.
10. The employee is charged with violating work rule #13, of the UTIA, use of abusive language, in that the employee directed profane expletives at the shop foreman at Murray Truck Lines on June 18, 1981, verbally threatened the owner of Murray Truck Lines on June 18, 1981, and directed profane expletives at Mr. Tommy Coley during the Madison County livestock field day on July 24, 1981.

Employee denied all of the foregoing charges relating to improper job behavior and inadequate job performance, placing them at issue and on the first day of the hearing in this matter, April 26, 1982, filed with this hearing examiner the following statement of counter issues.

Whether or not the charges in all actions taken or proposed to be taken against the defendant, Robert B. Elliott, the University of Tennessee Agricultural Extension Service and any and/all of its officials, employees and those acting in concert and/or participation with them, including but not limited, to the white members of the Madison County Agricultural Committee, Murray Truck Lines and its officials and Jack Barnett were taken or proposed because of racial prejudice and/or discrimination against defendant because he is black and/or because of his complaints against racial discrimination by said persons or agen-

cies named above, and/or because of his actions in seeking to play golf or use the facilities of all-white country clubs open to virtually any white member of the public but from which black citizens are or were excluded solely because of race or color. (Exhibit #2)

and a statement of additional counter issues as follows:

Whether or not the charges and all actions taken or proposed to be taken against defendant as set out in his original statement of counter-issue or otherwise in this proceeding are illegal, unconstitutional and void as depriving him of rights secured by the Thirteenth and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. Sections 1981, 1982, 1983, 1985, 1986 and 2000e.

Whether or not said charges and actions are illegal and void because of non-compliance with Chapter 44 of Title 8, T.C.A. (Exhibit #3)

Due to the nature of the charges against employee by employer, more specifically those which allegedly evolved from actions of employee in response to alleged racial slurs and epithets, substantial testimony and argument relating to race, was permitted in order to give this hearing examiner a more full understanding of the matter before him. However, it is the hearing examiner's opinion that this was not the appropriate forum and that he has no jurisdiction under the UAPA contested case provisions, *supra* to try civil rights actions on the merits as proposed in employee's counter charges. If an action lies, it lies not in state proceedings such as this hearing. Such an action has been filed by employee in the United States District Court in Jackson, Tennessee. *Robert B. Elliott v. The University of Tennessee, et al.* (C.A. No.

82-1014, W.D. Tenn. E. Div.) therefore, this hearing examiner concludes that if jurisdiction exists over the counter issues raised by employee, it exists in that Federal District Court and that employee may not try his civil rights actions in this forum. Employee's claim of racial discrimination as an affirmative defense to the charges against him is however, considered herein.

BACKGROUND

The University of Tennessee is a land grant university and administers the State of Tennessee's agricultural extension program through the University's Institute of Agriculture. The primary purpose of the agricultural extension service is to diffuse new agricultural, scientific and technological innovations and information developed at the agricultural experiment stations throughout Tennessee and the nation and home economics information directly to agricultural producers and to encourage those producers and their families to utilize this information to improve family living. Funds for the agricultural extension service are provided by the United States Department of Agriculture, under the Smith-Lever Act of 1914 (7 U.S.C. Section 341, *et seq.*), the State of Tennessee and each of the ninety-five counties. UTAES provides approximately 80 percent of the funds (some of which are received from federal sources), and the counties provide approximately 20 percent of the funds.

The UTAES is part of The University of Tennessee, and its one-thousand employees are employees of the University. Tennessee State University is also a land grant university, and operates an agricultural extension program and has agents in some counties. The overall state-wide agricultural extension service is administered by The University of Tennessee under the direction of the Dean of

Extension, Dr. M. Lloyd Downen. Downen functions in Tennessee as the representative of the secretary of the U.S. Department of Agriculture for all Tennessee AES programs.

By statute, all Tennessee counties maintaining an agricultural extension program are required to elect a seven-member agricultural extension committee. T.C.A. 4-9-3406. The purpose of this committee is to "act with duly authorized representatives of the State Agricultural Extension Service in the employment and/or removal of personnel receiving funds from county extension appropriations. . ." In practice, this means that mutual agreement must exist between each respective county agricultural committee and the dean of extension in order to either hire or remove an agricultural extension agent. Also, this means that in reality neither the University acting alone, nor the county agricultural committee acting alone, can effectively make unilateral decisions affecting the employment status of an agent in a given county.

In Tennessee when a county agricultural extension committee makes a recommendation to remove a county agricultural agent from service in the county the committee recommendation is forwarded to the dean of the UTAES in Knoxville. Although final approval is vested in the secretary of the U.S. Department of Agriculture, this has been delegated by the secretary to the dean who may *accept* or *reject* a recommendation of the county agricultural committee. County committees have no function in any capacity outside their respective counties.

The principal offices of the UTAES are located on the campus of the University of Tennessee Institute of Agriculture in Knoxville. The State is divided into five AES districts, each headed by a district supervisor respon-

sible for the AES programs within that district. Mr. Haywood Luck (hereafter Luck) is the district supervisor for District One, which includes twenty-one Tennessee counties west of the Tennessee River. Madison County is included in that district. Also, the District One headquarters are located in Madison County on the grounds of the West Tennessee Agricultural Experiment Station.

The district supervisor, in each district, is assisted by two associate district supervisors who respectively oversee the agricultural and home economics programs. Dr. Gene Turner (hereafter Turner) is the District One associate district supervisor for agricultural programs, and Mrs. Alpha Worrell is the associate district supervisor for home economics programs.

The top administrative position of the AES in each of the ninety-five Tennessee counties is that of the county extension leader, formerly known as county agent. The extension leader reports directly to the district supervisors in coordinating all AES activities within his/her county, and the extension leader is the immediate supervisor of all other agents in the county office.

There are also state-wide specialists within the AES, whose responsibilities include providing technical assistance to agents in the counties. These specialists possess technical and research expertise in the various subject-matter areas and are available to the county AES offices to help with particular problems encountered by AES clientele, ie, individual farmers, farm families and agricultural businesses. They also help individual AES agents or county AES offices in planning, implementing and evaluating various educational programs of AES. These specialists also interpret research and development information from agricultural experiment stations and disseminate such in-

formation in bulletins and in various ways for use by AES agents in serving AES clientele.

The UTAES renders educational services in four major extension program areas: agricultural production and marketing, 4-H youth programs, home economics, and community resource development programs.

Agents are assigned to agricultural programs by the county extension leader and these programs come under the overall general supervision of a district supervisor for agricultural programs. In District One which includes Madison County, the person charged with the responsibility for adult and youth agricultural programs is Dr. Gene Turner. The mission of agents assigned to agricultural programs is to take the latest research findings directly to agricultural producers and encourage them through group teachings, demonstrations, individual farm visits, etc. to utilize this information to improve their agricultural operations and overall economic situations.

The UTAES has adopted a management by objective (known as MBO) system of evaluating performance of its employees. Performance ratings of county professional employees are recommended by the county extension leader, to the district supervisor who assigns an official rating for the fiscal year with the final approval of the State extension administration consisting of the dean, an associate dean in charge of agricultural programs state-wide, an associate dean in charge of home economics programs state-wide and an assistant dean. AES District One Supervisor Luck has the responsibility for officially evaluating agents located in Madison County.

The AES is essentially an educational arm of the land grant university system in which each farm may serve as an individual classroom. In order to be effective, under

the supervision of the county extension leader, each agent must implement an orderly and organized planning approach to his overall educational program. Each county office of the AES develops a five-year plan of work to guide its staff in its mission. One-fifth of the plan of work is updated annually. It is the responsibility of the leader of each county office to direct his staff in measuring its progress against objectives, and at the end of each year report this progress to the appropriate district office which in turn reports to the State extension administration. Therefore, cooperation in working together with supervisors at all levels is required for effectiveness.

The first task faced in planning by each agent assigned agricultural program responsibilities is to establish who is the audience or clientele in the county who are to be served by his program. Once this is established eg., all cotton producers, cattle producers, small farm families, etc. an agent needs to determine program needs and opportunities that relate to his clientele and establish priorities accordingly. The time-tested method by which the AES has accomplished this purpose is by utilizing farm surveys to establish a data base for a particular group of agricultural producers. Once program needs and opportunities are identified, the agricultural agent's primary task is to begin to develop an educational program designed to solve problems, further identify the needs of his clientele and help them take advantage of opportunities for better living. The agents, thus the AES actual educational mission begins with the implementation of the educational plan. In effect, the AES in Tennessee and nationwide, is an educational program designed to provide for instant technological information transfer from the University's agricultural and home economics research facilities to the agricultural community.

A 4-H and youth program is operated in each of the ninety-five Tennessee counties and is designed to develop good character and citizenship and to teach useful and practical skills.

Community resource development programs deal primarily with problems that require group or community action. These programs vary from county to county depending on the needs of the counties over a period of time.

As an educational professional each agent assigned agricultural program responsibilities must of necessity spend considerable time out of the office working with, teaching, and motivating agricultural producers within his assigned program area. This may require meetings and individual visits beyond normal working hours. Accordingly, while direct program supervision is the responsibility of the county extension leader, ultimately the district supervisor and state-wide leader for agricultural programs, self supervision by agents is necessary on a day-to-day basis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The term inadequate may be defined as insufficient, disproportionate, lacking in effectiveness or in conformity to a prescribed standard of measure. *Black's Law Dictionary* Fifth Ed., 1979, p. 683. Improper by definition means not suitable, unfit, not suited to character, time, and place. Also, it means to be not in accordance with right procedure and not in accord with propriety. *Black*, supra, p. 682. See also *Landry v. Daley*, D.C. Ill., 280 F Supp. 968, 970.

Thus employee behavior that lacks conformity to a prescribed standard or measure such as time could be described as inadequate. Similarly, behavior not in ac-

cordance with right procedure and not in accord with propriety may be described as improper.

As to Charges of Inadequate and/or Improper Job Behavior and Inadequate Performance

1. Charge of Inadequate and/or Improper Job Performance, Playing Golf During Working Hours

Employer offered proof that in the spring of 1976 shortly after Extension Leader Shearon came to Madison County, he received a phone call from a Madison County citizen alleging that employee was playing golf during working hours at Woodland Hills Country Club. Shearon testified that he called H. T. Short, District Supervisor at the time, and that together they went to Woodland Hills, made inquiry and was informed by the manager that employee Elliott was there playing. Short testified that they left without further checking, that he talked with Elliott the following week about the incident, that Elliott admitted that he was there playing golf and promised that he would not do it again. Short further testified that as far as he knew employee did not play golf again during working hours while he was district supervisor. Elliott introduced evidence that he was at the club on extension business, having been called there by the manager, Mr. Jack Fox and while there played a brief round of golf during his lunch hour, somewhere around 11:00 a.m. (Short, Shearon, Elliott, Fox testimony). Elliott further testified that he often began work as early as 6:00 a.m. in the morning (later confirmed by credible former witness), often worked through lunch, sometimes worked after 5:00 p.m., and that he felt justified if he wanted to stop and hit a bucket of balls at 2:00 p.m. or play during lunch hour at some time other than between 12:00 and 1:00 p.m. and that he was within his right to do that.

Employer offered further evidence that employee played golf at the Jackson Golf and Country Club on July 31, 1981 beginning about 3:00 p.m. in the afternoon. Employee admitted that he played golf on July 31, 1981 but claimed the time was around 4:00 o'clock, further that he had worked through the lunch hour on that day and that he was taking his lunch hour playing golf at that time.

By his own admission Elliott played golf at the Humboldt Golf and Country Club on Friday, May 5, 1978. He further testified that he thought he was on leave on that day, that he had intended to take leave May 1 through May 5. Leave records indicate no leave was taken on May 5, 1978.

It was undenied that although normal working hours for Agricultural Extension Service professional employees is between the hours of 8:00 and 5:00 p.m., due to the nature of their work which often requires them to conduct night meetings and other after hours work-related activities, though compensatory time as such is not an official policy of the AES, some degree of flexibility is permitted of necessity and that it is generally left to the discretion of supervisors of employees to see that they get the job done without abusing their professional discretion (Testimony of Shearon, Downen, Blakemore, Matlock, Butler, and Elliott). I cannot agree with employee's contention that his lunch hour extended to 4:00 o'clock in the afternoon. On the other hand, under normal circumstances, again due to the nature of the extension employee's job responsibilities, exercising professional discretion in occasionally leaving the office early or arriving late is, if not by established policy, in practice permissible conduct. By weight of the evidence I find that employee did in fact play golf during working hours in the spring of 1976,

again on May 5, 1978, and on July 31, 1981. Throughout employer's offer of proof numerous references were made to complaints about employee's playing golf and one letter from a citizen alleging that employee played golf during working hours was introduced (Exhibit #39). However, the writer of the letter lived in Madison County and presumably was available as a witness but was not called. Therefore, a preponderance of the evidence does not substantiate any further incidents of playing golf other than on the above dates.

UTIA personnel policy provides for a multi-step procedure in dealing with employee behavior requiring disciplinary action (Exhibit #127). It further provides that:

To be effective, a program of this nature must consider the nature of the offense, the past record of the offending employee, and penalties appropriate to the offense.

Furthermore, it provides that it is hoped that the unsatisfactory performance or behavior noted will be corrected, and I believe assumes that both employer and employee will work toward that end.

Assuming this to happen, the sequence of disciplinary action will be considered halted twelve (12) months after the last disciplinary action taken. If unsatisfactory performance or behavior recommences after the twelve (12) month period, *a new sequence of disciplinary actions shall be started . . .* (Emphasis added)

Therefore, based on the testimony presented and in view of this policy, the charge of inadequate and/or improper job behavior for playing golf during working hours in 1976 and in 1978 made December 18, 1981 some 3 to 5 years later is not well founded (Exhibit #115). The July

31, 1981 incident, however, viewed in light of the same UTIA policy, the undisputed testimony of both Shearon and Elliott that Elliott had been warned of complaints about golf playing during working hours and had been relieved of professional duties of assisting golf courses does, I conclude, amount to improper and/or inadequate employee behavior (Testimony of Shearon, Elliott and Exhibit #22). In my opinion, the incident of playing golf at 4:00 o'clock in the afternoon although not precisely in conformity with the prescribed standard of normal working hours of the AES, under normal circumstances standing alone would not require disciplinary action; but coupled with violation of his supervisor's order not to play golf during working hours puts it in a different light and in my view for an employee to play golf during the hours of 8:00 a.m. to 5:00 p.m. while not on leave, under the circumstances, is not in accord with propriety and therefore improper. This finding will be considered for purposes as this hearing along with all findings keeping in mind the "... nature of the offense, the past record of employee and the penalties appropriate to the offense".

2. Charge of Conducting a Commercial Cabinet Business During Working Hours

At the conclusion of its proof employer requested and was granted the right to later call employee Elliott to question him directly about the charge that he conducted a commercial cabinet business during working hours. It was not disputed that Elliott did in fact own and operate a commercial cabinet business located on the premises of his residence near Humboldt, Tennessee in Gibson County. Elliott also admitted owning a van-type vehicle which he used in his cabinet business and sometimes drove to work. A number of Elliott's witnesses admitted on

cross-examination that Elliott had built and installed cabinets for them but there was no substantial evidence presented at the hearing to show that the cabinets were made and installed during normal working hours from 8:00 a.m. to 5:00 p.m. The University called no direct witness in support of its charge of conducting cabinet business during working hours. Furthermore, early in its cross-examination of Elliott, the University voluntarily waived further cross-examination thereby choosing not to exercise its previously reserved right to examine him in detail about the cabinet charge. Therefore, I find that the University of its own voluntary decision chose to not go forth with its proof, thereby, failing in its burden of proving the charge of conducting commercial cabinet business during working hours.

3. Charge of Making, or Allowing to be Made, Harassing Telephone Calls to the Home of Jack Barnett

Employee is charged with making anonymous telephone calls to the residence of Mr. Jack Barnett, a resident of Gibson County, Tennessee on August 16, 1979 (Exhibit #118). This was during the time of the Humboldt Golf and Country Club annual golf tournament in August 1979.

Anonymous telephone calls made to harass another person are illegal by statute in Tennessee. T.C.A. Section 39-3011 provides in part as follows:

It shall . . . be unlawful for any person or persons to make use of telephone facilities or equipment (1) for an anonymous call or calls, whether or not a conversation ensues, if made or communicated in a manner reasonable expected to annoy, abuse, torment, threaten, harass or embarrass one or more persons, or (2) repeated calls, if such calls are not for a law-

ful purpose, but are made with intent to abuse, torment, threaten, harass or embarrass one or more persons.

In my opinion, a finding that an employee is guilty of violating the above statute would constitute behavior unacceptable to the University or to the community at large and thereby be in violation of the UTIA work rule #24.

It has been held that an employer can go forth with its proof on such a charge as we have here, though the related criminal process has not yet been finalized in a criminal court. E.g., *Paine v. Board of Regents University of Texas System*, 355 F. Supp. 199 (W.D. Tex. 1972), aff'd, 474 F. 2d 397 (5th Cir. 1972); *Jones v. State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968), aff'd, 407 F. 2d 834 (6th Cir. 1969) cert. denied, 397 U.S. 31 (1970); *Furutani v. Ewingleben*, 297 F. Supp. 1163 (N.D. Cal. 1969) cert. denied 397 U.S. 31 (1970); *Krasnow v. Virginia Polytechnic Institute and State University*, 414 F. Supp. 55 (W.D. VA. 1979). This criminal charge though brought in 1979 and employee having been indicted in 1979 by the Gibson County Grand Jury of the charge of making harassing calls to Barnett has never been tried. Venue was moved to Madison County and due to a series of postponements there resulted over a three-year delay, without employer taking action on the matter awaiting the outcome. Prior to the beginning of this hearing on April 26th employee moved to strike this issue on the grounds that:

- (1) Said charge is unrelated to any job-related function or obligation of the defendant.
- (2) Defendant is presently defending said charge in a criminal case pending in the circuit court of Madison County, Tennessee. . .

Due to the long delay, motion was denied and employer was permitted to put on its proof relative to the charge. In support of the charge the University offered testimony by Jack Barnett, former tournament chairman of the Humboldt Golf and Country Club that the employee attempted to play on the course on May 5, 1978 and was expelled by the sheriff's department. Thereafter, Barnett testified that employee called him several times while he was president and tournament chairman asking to play golf in the tournament. There were several hours of testimony on direct and cross-examination of Barnett and examination of employee, much of which bore on racial issues related to a series of events that allegedly took place prior to that time. This hearing examiner declined to rule on race-related counter issues. I further decline to so rule. However, of necessity in order to allow for a full understanding of the issues and for consideration as an affirmative defense a substantial amount of race-related testimony was allowed here and throughout this hearing.

Witness Barnett outlined a series of nine phone calls between the 12th and 27th days of August, 1979, made to his home in which he testified that no one answered when the receiver was picked up. He also testified that two additional phone calls in the early evening of August 16, 1979 when employee called, identifying himself and asking him about playing in the tournament. Barnett admitted that at least one phone call he may have used the words "black nigger" in responding to the call. Barnett further testified that phone calls had become so annoying that he requested South Central Telephone Company to initiate a procedure for tracing calls to his number. Employer's witness Robert Kibler, securing manager of South Central Bell's Jackson office testified that upon receiving a phone call from the central business office he initiated

tracing equipment produced by Western Electric and designed by Bell Electric Laboratories. Kibler further testified that he was not personally trained in the detailed scientific theory and operation of the equipment. Exhibits were introduced indicating that calls were traced to the employee's home number 784-4218 on August 29, 1979 at 11:44 p.m. and on August 30, 1979 at 12:21 a.m. There was a slight discrepancy in the time of two and three minutes respectively between the times reflected in the exhibits and Barnett's testimony (Exhibits #11, 11A, 13 and 14).

Employee claims that Kibler conspired with the Humboldt Telephone Company and others to implicate him because of his race and the series of events that took place during his efforts to become a member of the Humboldt Golf and Country Club. Employer on the other hand claims the facts indicate that someone at Elliott's residence did initiate the August 29 and 30 calls to Barnett's residence, that Elliott had a motive to make such calls, that he had wanted admittance to the golf tournament from which he felt excluded because of his race, and that he had been making identified calls to Barnett in an effort to gain entry to the golf club.

Due to the nature and circumstances of the charge, and after having listened to the evidence presented by both parties, I conclude that it would be in the best interest of justice to leave final disposition with the criminal court in Madison County and the Tennessee Criminal Court system. Accordingly, I refrain from making a ruling thereon.

4. *As to Charge of Improper Job Behavior at Murray Truck Lines During Working Hours*

UTAES Dean, M. Lloyd Downen, testified that in the middle of June 1981 he received a telephone call from

a Mr. Tom Korwin, shop manager, Murray Truck Lines, Jackson, Tennessee, who appeared to be upset, alleging certain misbehavior of Agricultural Extension Service employee Robert B. Elliott at the Murray Truck Lines' place of business on June 18, 1981. Downen said "I told Mr. Korwin, who I thought was upset, that I would call him back." Downen further testified that on calling back in two or three days he found Mr. Korwin was out of the office and related to a Mrs. Sherry Mullins, an employee of the Murray Truck Lines, that if Mr. Korwin wished to make a complaint about the behavior of "one of my agents, then he needed to do so in writing, and she agreed to give him the message." Subsequently, Downen received a letter of complaint from Korwin dated July 17, 1981, as follows:

Per your conversation approximately three weeks ago with Mrs. Sherry Mullins of this firm, the following is a summary of the facts to the best of my recollection to the events which occurred on June 18, 1981 involving an employee of yours, Mr. Robert Elliott.

On about 2:00 p.m. on the above mentioned date, a middle-aged black man came into my office from the rear of the building, which is 'employees only' area. He asked to speak to the owner of the company, so I requested his name and the nature of his business, which he refused to divulge. I explained that Mr. Murray the owner, was very busy and for this reason, I would need to be able to extend the courtesy of a proper introduction if I have to interrupt his work. After he had refused three times to give me this information, he finally said, "I may not want him to know my name."

Since he was so persistent, I explained the situation to Mr. Murray, who thinking it must be one of the

parties involved in an accident he had witnessed the day before, came to talk to the man.

Upon Mr. Murray's appearance in my office, the man started speaking in a aggressive manner, and quickly progressed to a verbal rage, referring to Mr. Murray as a white racist and other racially oriented slurs. He then threatened Mr. Murray, saying "I hope I catch you out somewhere, because I'll be waiting."

Since it was obviously impossible to have a rational discussion with the man, Mr. Murray then pointed out the fact that he was on private property, and no longer was welcome. The man then said that this property was purchased with the aid of the City of Jackson, which gave him the right to do as he chose. Mr. Murray again told him that it was private property purchased with private money, and asked him to leave the premise.

He then departed out the back door and went next door to the Tubb's Cabinet Shop. I inquired there later as to what he did there and the cabinet shop personnel stated that he was attending to personal business.

He was driving a black Datsun pickup, pulling a trailer with a golf cart on it. I called the authorities with the license number and was given the name of Robert Elliott, of Rt. 1, Humboldt, Tennessee.

Some time between 2:30 p.m. and 3:00 p.m. the same day Miss Sherry Mullins answered a call from an *anonymous caller making veiled threats about break ins and trouble we could anticipate at our business.* When she asked the caller if his name was Robert Elliott, he became flustered and terminated the conversation.

Shortly after this, a call was received from Bobby Carter, a black businessman, of Carter's Car Center, 1303 North Royal Street, Jackson, Tennessee. He claimed someone had called him concerning our company and its policies. He stated that he felt that we were violating his Fifth Amendment rights, and that he would see that our business was boycotted. He said that their group's Nashville attorney would be contacting our attorney, and that they would see that we were caused excessive monetary expense through legal battles and harassment.

We were able to obtain the information that Mr. Elliott works for the UT Agricultural Extension Service, and made calls of inquiry to locate his superiors and inform them of his actions.

Had Mr. Elliott visited our firm in a normal courteous and businesslike manner, we would have been happy to discuss any grievances he felt he had. He instead chose to trespass on our property, make threats and have his associates make harassing phone calls, verbally abuse owner, disrupting our business from 2:00 p.m. on.

I also submit that *two weeks after these incidents Mr. Elliott was seen riding in the back seat of a vehicle which pulled up behind our building.* Mr. Elliott pointed to our building, with some discussion to the driver and passenger in the front seat. They then drove off.

We feel that the above incidents are an embarrassment to us, and especially to the UT Agricultural Extension Service, and appreciate your willingness to listen to the facts surrounding the issue.

If any further information is required, please feel free to contact us (Emphasis added) (Exhibit #17).

Downen further testified that he did not respond to Korwin when he received the letter but called District Supervisor Haywood Luck and asked him to arrange for himself, Extension Leader Shearon and Elliott to come to his office on August 5, 1981 for the purpose:

I wanted to hear from Mr. Elliott. I needed to know from him whether or not the incident occurred and if so, what took place . . . he was the one about which the complaint was submitted and the first thing I wanted to know was whether or not there was any validity to it . . . *all I had was a complaint from a private citizen about the alleged conduct of one of our agents, Mr. Elliott, so I had no conclusions at that point.* (Emphasis added)

While employee testified later in this hearing that he was on leave on this date he does not deny that he may have forgotten by the August 5th conference and assumed he was on duty at the time he entered on the premises of the Murray Trucking Lines at somewhere around 2:00 p.m. in the afternoon of June 18, 1981.

Downen further testified that during this conference Elliott related to him that he was on duty and was on his way to the Tubb's Cabinet Shop located across an alley from the rear of the Murray Truck Lines to visit a farmer who worked there when he saw signs in Murray's windows which read "The last black thief got four years." Elliott further related that this upset him, that he did enter the rear of the building, that there were no employees only signs or no trespassing signs visible, that he did talk with the man later identified as Tom Korwin, that he asked to see the manager of the business

to see what kind of person would put up a sign like that in 1981, that he continued to insist upon seeing the manager, that he did refuse to identify himself and that finally the manager, Mr. Murray, came out and he told him that he was offended by those signs and "asked Murray to take those signs down", that Elliott denied that he called Murray a white racist, that he did not think he was overly aggressive and did not think he acted in a threatening manner to Mr. Murray. Elliott later testified similarly, but denied that he was on duty at the time, but was on leave. Downen testified that he accepted what Elliott said. He said:

I accepted that he perceived that while upset with the sign he was protesting the sign, it was offensive to him, and I accepted that he may have believed that he was not being overly aggressive and that he, perhaps was not speaking or intended to threaten Mr. Murray. At the conclusion of the conference I told Mr. Elliott that I had heard his statements, that I was concerned that even though he perceived that he was not threatening Mr. Murray that he was not conducting himself in an improper way, *I also knew that there were uh, citizen who felt that Mr. Elliott was coming on overly aggressive . . .* I then told Mr. Elliott that I was giving him an oral warning that because his behavior need to improve in this fashion and the reason for that was *to apprise him of the fact that there were people who perceived that he was overly aggressive* when he addresssed some of these social issues this particular time and that I wanted Mr. Elliott to be aware of that so he would have an opportunity to improve and avoid getting into those sort of circumstances . . . the purpose of an oral warning is to help or to advise the employee,

in this case, Mr. Robert Elliott, that this was area of behavior in which he needed to improve. (Emphasis added)

On further examination Downen testified that after the conference in his office on August 5 at which time he gave Elliott the oral warning, that in keeping with University disciplinary policy he wrote Elliott a letter confirming the oral warning and placed a copy of the letter in his personnel file.

That letter, dated August 5, 1981, was later introduced in evidence in this hearing (Exhibit #108) and reads as follows:

This letter is to confirm the oral warning I gave you in my office this date about your *unacceptable job behavior*. This unacceptable job behavior occurred on about June 18, 1981 *as set forth in the letter dated July 17, 1981 to me from Tom Korwin*. You have a copy of that letter.

Additional complaints about *unacceptable job behavior* or *unsatisfactory performance* may result in more severe disciplinary action.

A copy of this letter is being placed in your personnel file, folder. (Emphasis added) Section 500, University of Tennessee Institute of Agriculture personnel procedure relative to employee disciplinary actions provides that the concept of "progressive discipline" shall be followed (Exhibit #117). It provides that:

The supervisor shall first notify the employee orally of inadequate work performance or unacceptable job behavior. *The employee should be told what corrective actions are necessary and when the corrective actions are expected.* The date and nature of this

oral warning should be documented in the employee's personnel file. (Emphasis added)

It is clear from the evidence presented during this hearing that at no time did employer question employee's right to address what he perceived as social wrongs while on duty, but the manner in which he went about it.

Downen's letter to Elliott's counsel dated November 5, 1981 (Exhibit #112(b)) advising him that upon further investigation he believed his actions of August 5, 1981 in giving Elliott an oral warning followed by a confirming letter were correct and that he had decided not to remove the letter from Elliott's personnel file clearly reveals that Elliott was not being disciplined because he entered upon the premises of the Murray Truck Lines during working hours to question the propriety of the signs, but because the manner in which he conducted himself while there was considered improper. Moreover, Downen did not question his First Amendment right to speak out against social wrongs; therefore, whether or not he should have been there is not at issue. Downen's actions were based on information available to him which he perceived to be undesirable employee traits harmful to the public service mission of the AES. In his letter he stated as follows:

While I recognize Mr. Elliott's First Amendment rights, I feel that Mr. Elliott's behavior regarding Murray Truck Lines was inappropriate under the circumstances. Since he perceived a social wrong, he should have first investigated the facts and then calmly asserted his feelings that the sign was wrong and that such sign should be removed. Furthermore, Mr. Elliott told me he was on duty when he had this confrontation with Mr. Murray. While he is on duty,

Mr. Elliott's public behavior should be impeccable. He certainly may address social wrongs in his official business contacts, but he must first investigate the facts and not respond with aggressive emotions, profanity, or the use of veiled threats.

It is undisputed that an oral warning was given Elliott on August 5 followed by a written confirmation of that warning of August 5, that Elliott specifically requested that this action be rescinded and the letter removed from his file, and that Downen upon further investigation believed his action to be correct and declined to remove said letter from Elliott's personnel file. Therefore, as trier of fact the first question to be resolved that directly relates to the charge of improper job behavior by employee during working hours on June 18, 1981 Murray Truck Lines is whether Downen acted properly in initiating disciplinary action in the form of an oral warning at this point in time.

At the August 5th conference Elliott admitted that he was on duty at the time of the incident but later claimed that he was on leave. That question will be resolved later under the broader issue of overall improper behavior relative to this incident. At this point in time, Downen was correct in accepting Elliott at his word that he was on duty.

It is understandable that Downen as top administrator for the AES and responsible for the performance and behavior of extension agents state wide was greatly concerned about the allegations made by Korwin, a citizen of Madison County, about Elliott, an extension employee in Madison County. The success or failure of the AES mission at any and all levels is dependent not only on performance of its employees but also on the professional

image that they portray at all times, but more specifically during working hours before the citizens whom they serve.

If Downen based his decision to give Elliott an oral warning on information other than what was contained in the Korwin letter the evidence does not so indicate. As already stated, he indicated that while he accepted as fact that Elliott believed that he was not behaving improperly, he indicated that he also knew that a citizen, referring to Korwin, felt that Elliott was coming on overly aggressive. When asked the question what citizen, Downen responded:

Mr. Korwin, and from the letter, Mr. Murray. I then told Mr. Elliott that I was giving him an oral warning that because his behavior needed to improve in this fashion and the reason for that was to apprise him of the fact that there were people who perceived that he was overly aggressive when he addressed some of these social issues at this particular time and that I wanted Mr. Elliott to be aware of that so he would have an opportunity to improve and avoid getting into those sorts of circumstances. (Emphasis added)

Downen's August 5th letter confirming the oral warning stated:

This unacceptable job behavior occurred on or about June 18, 1981 as set forth in the letter dated July 17, 1981 to me from Mr. Tom Korwin. (Emphasis added)

I believe that from an administrative point of view Downen believed that he was following correct procedure. I find no reason to believe that he acted other than in good faith. I also find, however, that based on his own testimony in this hearing and on the letter of August 5, 1981 to Elliott that he acted solely on the basis of what was

set forth in Korwin's letter to him dated July 17, 1981 in that two citizens, Korwin and Murray perceived Elliott's behavior and manner, which he at that point in time deemed unacceptable job behavior. Granted at this point in time this was still in an administrative setting and that Downen as an administrator was not bound in his decision by strict procedural rules of law. However, the actions taken relate directly to what this hearing is about and therefore must be dealt with.

Had Downen acted on information related to him by Elliott's supervisors at the county and district level, after they had investigated the incident and reported that two or more people, in this case Korwin and Murray, as Madison County citizens perceived Elliott's behavior to be overly aggressive, and that Elliott admitted that he was there, that he refused to reveal his name, that he demanded that Murray remove the signs, as he later did, then, in my opinion an oral warning from him or Elliott's appropriate supervisor would have been in order. It is clear, however, that the actions taken were based solely on Korwin's letter which neglected to mention the signs and in addition to the allegations related to employee's behavior on the Murray premises also related other incidents such as anonymous phone calls, veiled threats and generally disrupting their business on that date, further implicating Elliott. (Exhibit #17).

In my opinion, considering the disparity of facts as related by Elliott and as received by Downen from Korwin's letter, coupled with Korwin's failure to mention the signs whether by design or neglect, propriety should have led to further investigation prior to the oral warning. Furthermore, an employee should have the right to know precisely what charges are being made against him and

what actions are expected of him. While the behavior of Elliott while on the Murray premises may be outlined in Korwin's letter as he perceived it, the letter also implies additional serious charges including anonymous calls and threats which I find confusing. Also Downen's letter to Elliott if not directly, does imply that he was also being charged with unsatisfactory performance at that point in time in addition to improper behavior (See Exhibits #17 and 108). I cannot agree that the actions taken based solely on the Korwin letter met UTIA personnel procedural requirements. Also, in my opinion, the receipt of allegations of improper behavior of an employee by a single citizen would require further investigation and close scrutiny prior to taking any disciplinary action against the employee. This should be even more applicable to allegations made by letter alone.

In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 299 S. Ct. 693, 58 L.Ed. 2d 619 (1979) the court said:

That a court must balance the interest of the (teacher) as a citizen in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

Applying the same logic here, I find that the oral warning given employee on the basis of a letter from a citizen alleging employee misbehavior, standing alone without further investigation was premature under the circumstances.

Before dealing finally with the charge of improper job behavior during working hours on July 18, 1981 at Murray Trucking Lines it is first necessary to determine whether or not employee was in fact on duty at the time the incident occurred. It is not disputed that Elliott en-

tered the rear entrance of Murray Truck Lines at approximately 1:30 to 2:00 p.m. on that date. Moreover, Elliott admitted that on August 5, 1981 during the conference with Downen that he related to him that he was on duty on June 18th. He later related in a second conference in the presence of his counsel that he was on leave that day and *was on his way home* when he stopped by the Tubb's Cabinet Shop in the rear of Murray Trucking Company at which point in time he saw the signs in the windows, was upset and entered the premises. Elliott claimed he had called in for leave for that date, that he later signed the leave form, that it was left on Shearon's desk who was out of town for two weeks and that the leave slip was never signed by Shearon. That leave form is a part of the record of this hearing introduced as Exhibit #121. Employee further testified during the hearing that he was on leave at the time and again relied on the unsigned leave form. He further testified:

I was, had gone to Woodland Hills to pick up my golf cart and *was on my way to Pinecrest to play golf that afternoon*. I was on annual leave. I stopped by the Tubb's Cabinet Shop and I pulled up and there was a sign saying, the last black thief got four years. (Emphasis added)

Employer did not deny leave requests made in that manner were usually granted. However, employer did offer proof in the form of a weekly Tennessee Extension Management Information System (TEMIS) report which indicated that Elliott was on duty the afternoon of June 18th. TEMIS is the official reporting system used by the AES in the State of Tennessee. The reports are completed, signed and turned in by the respective employees for their work during each reporting period. The report for June 18, 1981 offered in evidence by employer was

claimed to be in error by employee, but was authenticated by his signature, Robert B. Elliott. In my view, the TEMIS report signed by employee himself, coupled with his inconsistent statements, outweighs the unsigned leave form submitted by employee. Accordingly a preponderance of the evidence leads me to conclude that employee was in fact on duty on July 18, 1981 when he entered upon the premises of the Murray Truck Lines, and I so find.

Now if proved, the charge of improper job behavior during working hours on June 18, 1981 based on allegations of Korwin and Murray, in my opinion would be a serious breach of behavior traits, or characteristics expected of an extension agent whose job responsibilities specifically involve serving the public.

Under the UAPA the moving party, in this case the employer has the burden of proof. In its offer of proof employer relied on the testimony of Steve Murray, manager of Murray Trucking Lines and the letter written by Korwin dated July 17, 1981. Korwin was not called as a witness during the hearing. The letter standing alone is clearly hearsay. The UAPA provides that evidence not admissible under the rules of court may be admitted but further provides as a matter of policy, the agency shall provide for the exclusion of evidence which in its judgment is irrelevant, immaterial, or unduly repetitious (T.C.A. 4-5-109(1)). The courts have stated that as a practical matter less time is consumed admitting evidence and then disregarding it if it is incompetent or irrelevant, than to argue about its admissibility and, if the evidence is improperly excluded, wastes more time in a new or supplementary hearing. See *Samuel H. Moss, Inc. v. F. T. C.*, 148 F. 2d 378 (2d Cir. 1945), cert. denied 326 U.S. 734, 66 S. CT. 44, 90 L.Ed. 438. Thus by authority of the UAPA and the courts, as a practical matter this

practice was adopted during this hearing. T.C.A. 4-5-109(1), also provides:

The agency shall admit and give probative effect evidence admissible in a court and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court. . .

The general rule is that hearsay evidence is not admissible in court for the reason that the person making an assertion is not under oath when the assertion is made, is not subject to cross-examination as to its truth or falsity, and is not confronted with the parties in the action, nor before the judge and jury. Thus in the Korwin letter, the safeguards of oath, cross-examination and confrontation as to his credibility do not exist as to the assertions made by him. Korwin was a resident of Madison County, had appeared and spoke to this incident before the Madison County Agricultural Extension Committee (MCAEC) and could have been called to testify in these proceedings, but was not. Therefore, although admitted, I cannot give weight to the letter in support of this charge for the foregoing reasons. This leaves the testimony of Murray offered by employer in support of the charge. Murray testified that on June 18, 1981 at approximately 2:00 p.m. his shop manager, Tom Korwin, came into his office and informed him that there was some man that wanted to see him but would not give his name. He testified that he went with Korwin to Korwin's office where Elliott said he wanted to see the kind of person who would put up the kind of sign that was in his window. Murray admitted that Korwin had put signs in the windows of his business stating that "the last black thief got four years". He further testified that Elliott called him a racist, but on cross-examination admitted that Elliott could have

said that the "sign" was racist. He further testified that "Mr. Elliott made the remarks to me that uh, that he would like to uh, catch me out somewhere, and he would see me down the road . . . he said that three times, and I took it as a threat to me personally." Murray said he told Elliott that he didn't have any business there and for him to leave, that Elliott told him that he did not have to leave because the building had been bought with city money and he didn't have to get out of there if he didn't want to, that he told him it was private money, then Elliott left by the back way. Elliott denied that he was trespassing, that he used abusive language, or that he verbally threatened the owner or that he called him a racist, but that he did leave the premises after Murray told him he was on private property and that he would have to leave. Elliott admitted that he refused to identify himself, that he was angry when he saw the signs, that he told Murray he wanted to see the guy that had enough nerve to put up a sign like that in 1981, and that he told Murray that he would have to take the signs down, but did not consider his behavior abusive or overly aggressive.

In both the Murray Truck Lines incident and Coley incident, *infra*, Elliott responded to speech by private citizens which he perceived to be offensive to him as a member of the black race. This raises the question as to whether Elliott's own speech, amounts to protected speech under the United States Constitution. That the right of free speech is not absolute at all times and under all circumstances was well settled long ago by the Supreme court in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) as follows:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment. it is well under-

stood that the right of free speech is not absolute at all times and all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd, and obscene, the profane, the libelous, and the insulting or "fighting" words—those by which their utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "*Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.*" *Cantwell v. Connecticut*, 310 U.S. 296, 309, 310, 60 S. Ct., 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352. (315 U.S. Ct. p. 571-572 (Emphasis added)).

It is necessary in this hearing to determine whether employee's response to the signs in the windows at the Murray Trucking Lines and to what he perceived as a racial slur by Coley, *infra*, rises to the level of protected speech, and if so whether the proposal to terminate him by employer was because of his speech or for other valid reasons. In *Hildenbrand v. Trustees of Michigan State University*, 662 F. 2d 439 (6th Cir. 1981), the court outlined a series of Supreme Court opinions which I believe are directly in point. In that case the court said:

The law in this area has been outlined in a series for Supreme Court opinions. *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed. 2d

811 (1968); *Perry v. Sindermann*, 408 U.S. 593, 92 Ct. 2694, 33 Lawyers Edition L.Ed. 2d 570 (1972); *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 Lawyers Edition L.Ed. 2d 471 (1977); *Givhan* 99 S. Ct. 693 58 L. Ed. 2d 619 (1979). The threshold question is whether the plaintiff's conduct deserves Constitutional protection. In a public educational setting, a court applies a balancing test in determining what conduct is protected by the First Amendment. A court must balance "*the interest of the teacher as a citizen in commenting upon matters of public concern in the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.*" *Givhan*, *supra* 414, 99 S.Ct. at 696, quoting *Pickering*, *supra* 391 U.S. Ct. 569, 88 S. Ct. at 1734. If a court finds that an employee's conduct was protected by the First Amendment, the finder of fact must determine whether the employee was fired because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision to rehire him. *Doyle*, *supra*, 429 U.S. at 287, 97 S. Ct. at 576. *Givhan*, *supra* 439 U.S. at 416, 99 S. Ct. at 697. Once the employee meets this burden, the burden of proof shifts to the employer to prove that the employee would have been fired absent the protective conduct. *Givhan*, *supra* at 416, 99 S. Ct. at 697; *Doyle*, *supra* 429 U.S. at 287, 97 S. Ct. at 576 (662 F. 2d at pp. 442-443).

It is undisputed that the signs in the windows at Murray's business, "the last black thief got four years", were factually true. Also, Murray had the First Amendment right to place such signs in the windows of his

business even though they identified the ~~role~~ of the thief. See *Sambo's Restaurant, Inc. v. City of San Arbor*, 663 F. 2d 686 (6th Cir. 1981). Murray testified that the purpose for placing the signs in the windows was to deter thieves, that they had been burglarized four times in four months and this was their way of striking out against further theft. He further testified that he was against all thieves, black or white, and that he was not opposed to blacks as a racial category. He further testified, however, that after Elliott left his premises they took the signs down because "I think the main reasons why we took the signs down, were because we felt like that maybe we had overstepped our bounds, as far as our responsibility," that people passing by, not knowing all the facts, might assume that he was racially prejudiced because of the signs. Furthermore, it is clear that Downen did not question Elliott's First Amendment right to address social wrongs in his official business contacts but disciplined him because of what he perceived as undesirable employee traits harmful to the public service mission of the UTAFS (Exhibit #112b, supra).

It is well settled that an employer, the AES in this case, would have the right to discipline its employees because of undesirable employee traits harmful to its public service mission. The rule was well stated in *Weisbrod v. Donigan*, 651 F. 2d 334 (5th Cir. 1981), as follows:

An employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee. (651 F. 2d at p. 336)

See also *Accord, Megill v. Board of Regents of the State of Florida*, 541 F. 2d 1073; *Garza v. Rodriguez*, 559 F. 2d 259 (5th Cir. 1977), cert. denied, 439 U.S. 877 (1978).

The AES cannot be effective in its educational mission without the public support and confidence of the public audience in each county, both black and white. It is therefore important how the community at large views the behavior of an extension employee serving that community. Would a reasonable man be expected to act in a rude, aggressive, and threatening manner under the circumstances? I think not. Applying the balancing test, supra, whereby a court must balance the interest of a public employee, as a citizen, in commenting upon matters of public concern with the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees, the conduct of Elliott if proved as charged clearly would not come within the protection of the First Amendment.

A final question then is whether or not the AES as employer met its burden on the charge of improper behavior at the Murray Trucking Lines June 18, 1981.

The UAPA establishes the minimum quantity of evidence and the preponderance of evidence standard of proof for administrative hearing adjudication proceedings. See also *Steadman v. Securities Exchange Commission*, 101 S. Ct. 999 (1981). This may not be determined by the number of witnesses, but by the greater weight of all the evidence or more convincing than the evidence which is offered in opposition to it.

In weighing the testimony of Murray against the testimony of Elliott and considering their manner and demeanor while testifying under oath, I cannot find any substantial superiority of weight in either testimony over the other. Granted, Elliott admitted he refused to identify himself, that he entered the back way, that he was upset with the sign and that he told Murray he would have to take

the signs down. While I agree that Elliott's approach, based on his own testimony, leaves something to be desired, I keep coming back to the question how would the average citizen of "reasonable mind" of Madison County react under the circumstances and would both black and white citizenry view Elliott's response and conduct as a public employee unreasonable and improper under the circumstances. Again, applying the balancing test, supra, a balancing of the interest of Elliott, a black citizen of Madison County with the interest of his employer, the AES and applying the UAPA preponderance of evidence, minimum standard supra, considering the burden of proof is on the claimant, here the AES, I conclude that Murray's testimony alone set against Elliott's does not carry sufficient weight to meet this burden. That he was trespassing, was rude, used abusive language toward the shop foreman, that he called Murray a racist or that he threatened Murray, Elliott denied. If his behavior was in fact rude, abusive, overly aggressive and threatening beyond what would be expected of man of "reasonable mind", conceivably the burden of proof could have been met by the testimony of an additional credible witness. However, although this charge of improper behavior at the Murray Trucking Lines on June 18, 1981 was initiated by Downen after he received a phone call and subsequently a letter from Tom Korwin, shop manager for Murray Trucking Lines, alleging Elliott's improper behavior, Korwin was not called by employer in this hearing to testify under oath. Rather, employer relied on Korwin's letter of July 17, 1981 in its offer of proof (Exhibit #17, supra). No proof was offered that Korwin, a resident of Madison County and presumably available, was in fact unavailable.

In 49 *American Jurisprudence* 2nd. (Evidence, Section 180 at p. 224) it is stated:

It is a well-settled rule that if a party knows of the existence of an available witness on a material issue and such witness is within his control, and if without satisfactory explanation, he fails to call him, the . . . court . . . may draw the inference that the testimony of the witness would not have been favorable to such party. *Culburtson v. The Southern Bell*, 18 U.S. 584, 15 L.Ed. 493; *National Life and Accident Insurance Company v. Eddings*, 188 Tenn. 512, 221 S.W. 2d 695 (1949).

While this rule is applicable it is not essential to a finding that employer, the claimant in this hearing, failed in its offer of proof to meet its burden on this charge.

5. *Charge of Improper Job Behavior at the Madison County Livestock Field Day on July 24, 1981*

The circumstances leading to this charge of improper job behavior are similar to the Murray Truck Lines incident in that employee responded in both instances to speech which he perceived to be racially discriminatory, in the Murray incident the signs and in this incident conversation which he overheard and perceived to be slurs against his race.

Employer in its offer of proof claimed that on July 24, 1981 at a Madison County field day at a break between the end of the organized part of the program and farm tours to follow that Gary Boyette, Tommy Coley and Dr. Jim Neel were standing off to the side talking. Mr. Boyette and Coley are livestock producers and were participants in that program, Dr. Neel is a Professor of Animal Science and a staff member of the UTAES. Coley testified that while they were discussing the results from the District One junior livestock show and the State junior livestock exhibition that he asked Neel if he knew how the

little "nigra" boy from Tiptoni County did in the exhibition. He further testified that "at that point Mr. Elliott, quite loudly and abruptly placed himself, yelling 'Wait a goddam minute', several times; placed himself between Dr. Neel and I. He questioned my educational level . . . I had never seen anybody in such a rage in public, with me personally", that he was not talking to Elliott, and said "Robert, if the use of the word, that word offended you, I am sorry. I wish that I had said black, if that would have been better." Coley denied he used the word "nigger" but that he was proud of what James Smith, the black boy he was referring to had done with his animal and wanted to know how he did at the State exhibition.

Boyette testified that when Coley asked Neel "how did my little nigra boy, the one who had the grand champion lamb do?", Neel replied I don't know, at which point "a black man wearing a UT cap placed himself between Tommy Coley and Dr. Neel and said 'Wait a goddam minute, wait a goddam minute, wait a goddam minute'. I thought you had more educational ability about you than that." Boyette said that he did not know the black man at that time but identified him during the hearing as Robert B. Elliott.

Employee testified that at the time the meeting was over for the morning he noticed Mr. Shearon near the registration area working with WTJS and DXI radio personnel in interviewing various farmers about their use of a growth implant called RAL-GRO, that he watched very closely because he wanted to see if Mr. Shearon was going to interview Mr. Willie Boone, a black farmer who had used RAL-GRO on his farm but Shearon did not even speak to him or acknowledge him whatsoever and that "so, I was already a little keyed up over that. Then I heard Mr. Tommy Coley talking to Mr. Neel

. . . about something about judging a show and he went on to refer to a little nigger boy as having the best animal, but he wasn't going to place him first. And at that point I interrupted, in no uncertain terms, Mr. Coley commented that I told him I had overheard what he said. That I thought you had more educational ability than that. He put his hand up and he didn't really, didn't really realize that I was behind him, he kind of put his hand over his mouth and said, oh, I am sorry Robert. Would it have made any difference if I had said black? And I just didn't want to talk to him any more. I went over and told Mr. Shearon what happened and, his comment was, Robert I would just go on home if I were you." Employee further testified that he did not remember saying "wait a goddam minute" that he might have said wait a damn minute. Later in direct examination he denied that after the incident at the field day that he left the area cursing profusely. When asked the question "did you curse profanely at all, at any time during any events up there?" He answered "I don't remember. I was quite upset. I don't remember if I did or not. It's not my nature to do a lot of cursing, and if I did, I was not aware of it. If I said what he said I said, wait a goddam minute, I expect I would have remembered that." Shearon testified that Elliott came by where he was cursing and that he told him to go home although this was not mentioned in his report to the MCAEC on Elliott's performance (Exhibit #41). Elliott denied that he was cursing when he came by Shearon. On cross-examination Shearon testified that he had never asked Elliott about the field day incident or asked him for an explanation.

Employee introduced a letter from James B. Neel to Tommy Coley dated August 5, 1981 to support his testi-

mony that the word "nigger" was used (Exhibit #83). Mr. Willie Boone testified that he and Mr. Elliott had been talking and as he walked away going toward the barn where they had a feeder pig operation he heard someone say "nigger" and that he did not hear anything else unusual as he was continuing on his way to the barn. Neel was not called as a witness by either party during the hearing. Had employer, the charging party in this hearing introduced Neel's letter in support of its charge without calling him when he was an available witness, such evidence in my opinion, would have had little weight. However, I conclude that the letter offered herein by the adverse party comes within the well-established common law exception to hearsay and is admissible for the purpose which introduced. I further conclude that although Coley may have pronounced the word negro as nigra with no intended offense to the black race, three other people, Neel, Boone and Elliott heard it as "nigger" and I so conclude.

Subsequently, on July 27, 1981 Elliott wrote a letter to Dean of Extension, M. Lloyd Downen, calling to his attention the incident at Madison County Field Day. In the letter he stated:

I was at a field day and two men were talking about how one of them had placed an animal first, and at the next show the animal did not place. He then talked about 'that little nigger boy had the best animal, but I wasn't going to place him first!' This judge was Tommy Coley of Madison County. He then tried to apologize after finding out that I had heard him comment, and asked me if it would have made any difference if he had said black." (See Exhibit #8)

Copies of this letter were sent to Mr. Haywood Luck, Dr. James E. Farrell, and the U.S. Department of Justice.

Downen testified that as a follow-up to Elliott's letter regarding the incident he wrote to Coley sending him a copy of the letter. In his letter to Coley dated August 5, 1981 Downen stated:

As you may know, The University of Tennessee Agricultural Extension Service offers its programs to all eligible persons regardless of race, color, national origin, sex or handicap. I must make certain that all programs and activities are conducted by that principle. Because of the serious complaint made in the attached letter, I would appreciate any comments you might have. (See Exhibit #109)

Downen testified that his reason for the above statement was that the extension service does offer its programs regardless of race, color, national origin, sex or handicap and he wanted Coley to know that because it had been alleged by Elliott that Coley had judged on the basis of race rather than on merit and he wanted him to understand that he was not going to tolerate judging of 4-H or any other activities conducted by the extension service on any basis other than merit. Coley responded to Downen's letter by letter dated August 13, 1981 giving his version of what happened at the field day. Coley again related his version in his testimony during this hearing as related hereinabove. In the letter Coley said:

I hope you will take proper action concerning this agent and my reputation as a livestock judge. (See Exhibit #13)

It has already been stated supra that the events that took place at the Madison County livestock field day are similar to the Murray Trucking Lines incident in that both were responses by employee to speech which was offensive to him as a member of the black race, the signs

at Murray's and the words spoken by Coley which he heard as "nigger". There is an added dimension in the latter incident in that following the incident employee wrote to the dean of extension with copies to Luck, Farrell and the U.S. Department of Justice claiming that Coley in his role as a livestock judge had refused to award best animal to a black youth.

The rule that conduct and speech by an employee in opposition to acts of discrimination by private citizens, is not protected as it relates to employer discipline was stated in *Silver v. KCA, Inc.*, 586 F. 2d 138 (Ninth cir. 1978) as follows:

Not every act by an employee in opposition to racial discrimination is protected. The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual. In addition, the means of opposition chosen must be legal . . . and reasonable in view of the employer's interest in maintaining a harmonious and efficient operation.

In my opinion this rule applies to the acts of individuals at the Murray Trucking Lines, that is the signs placed in the windows, and the speech of Coley at the Madison County field day on July 24, 1981 which Elliott, Neel and Boone heard as "nigger". It is undisputed that both Korwin and Murray as well as Coley were not employees of The University of Tennessee Agricultural Extension Service but were private citizens and their acts in these incidents cannot be construed as acts of employer. Therefore, it follows that Elliott's acts were not directed in those incidents at any unlawful employment practice of the AES, his employer. Moreover, Elliott's charge of racial discrimination by Coley in 4-H livestock judging events

cannot be construed as directed at an unlawful employment practice of the AES. Although Coley had voluntarily and without pay participated in AES sponsored events such as the Madison County field day and 4-H livestock judging events it is clear that he was not an employee of the UTAES at any time related to these charges.

The weight of evidence supports Elliott's argument that Coley did refer to a black 4-H member as "nigger". Whether he said nigra, negra, or nigger, three people heard it as nigger and I so find. The First Amendment to the Constitution clearly does not prohibit a public employee, in this case, an employee of the AES to respond in opposition to racially discriminatory acts of others, in this case private citizens Korwin, Murray, and Coley. It is also well understood that the right of free speech is not absolute at all times and under all circumstances as stated by the United States Supreme Court in *Chaplinski*, supra. Moreover the law is clear that when an employee's behavior extends beyond these protective bounds that the employer has the right to discipline its employee if it can prove that employee's conduct exemplified undesirable traits in dealing with the public, citing again *Weisbrod v. Donigan*, 651 F. 2d 334 (5th Cir. 1981) which stated the rule as follows:

An employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee (651 F. 2d at p. 336).

Also *Accord, McGill v. Board of Regents of the State of Florida*, 541 F. 2d 1073; *Garza v. Rodriguez*, 559 F. 2d 259 (5th Cir. 1977), cert. denied, 439 U.S. 877 (1978).

The ultimate question relative to the charge of improper job behavior at the Madison County livestock field

day on July 24, 1981 is whether or not in fact, employee's conduct was improper. Downen testified that he personally traveled to Madison County to investigate the incident. On November 5, 1981 Downen wrote to Elliott (Exhibit #112a) as follows:

I have now completed my investigation of your claim, and I am of the opinion that your conduct on that occasion was improper and your profanity intolerable for the following reasons:

First, you claimed Mr. Coley refused to award best animal to a black 4-H youth. This claim was totally untrue, and in fact, the exact reverse was true. Mr. Coley had in fact awarded best animal to a black 4-H youth.

I find it very hard to understand how you could have failed to investigate the actual facts about your accusation prior to your publication of this accusation of alleged wrongdoing to me and the U.S. Department of Justice.

Moreover, your assertion that Mr. Coley should not be again used as a judge seems to have serious implications as to Mr. Coley's integrity, especially in light of the fact that your accusation was not true.

Additionally, your use of profanity in front of Mr. Coley was totally improper job behavior for a professional staff employee in your position, especially since your outburst was not proceeded by first determining the actual facts. . .

In my opinion, your language in front of Mr. Coley may well be the type of abusive language which is prohibited by the University work rules. *Accordingly, I am warning you again that verbally abusive out-*

bursts are improper job behavior and will not be tolerated and is the type of job behavior which can lead to further disciplinary action. Although I recognize fully your Constitutional right to express yourself, you must improve your behavior in dealing with people in Madison County community. When you perceive a social wrong, you should check out the facts before asserting your opinions. I expect you to make your assertions calmly, reasonably, and without profanity, or verbally aggressive and otherwise abusive words or behavior which will bring discredit to the University. (Emphasis added)

Here, as in the Murray Trucking Lines incident, it is clear that employee is not being disciplined for responding to what he perceived as racially discriminatory speech, but for the manner in which he responded and his subsequent response letter to Downen (Exhibit #8), Elliott's response, I conclude included falsely accusing Coley of discrimination against black 4-H members in his livestock judging, without investigating the actual facts.

The letter from Dr. James Neel to Tommy Coley, supra, was introduced in evidence during this hearing by employee, the adverse party. That letter introduced by the adverse party written August 5, 1981 while the July 24 incident was still fresh on Neel's mind would be admissible under well-established common law exceptions to the hearsay rule. In any event, by overwhelming weight of authority hearsay evidence may be admitted in administrative hearings with the trend toward admitting related testimony and allowing the trier of fact to assess the weight to be given to the testimony. That practice was followed in this hearing. Though employee was permitted to rely on Neel's letter in support of his own testimony relative to this incident, I do not find it necessary to rule on

the admissibility or the weight to be given to Neel's letter in support of employer's charge of improper behavior. This hearing examiner adopts the testimony of Coley and Boyette. This coupled with employee's own statements that he was already "burned up" because Mr. Boone had not been interviewed about his RAL-GRO demonstration when he heard Coley talking about "the little nigger boy" and his own admission during his testimony that he didn't remember for sure what he said, that he was pretty mad leads me to conclude that employee's behavior at the Madison County field day on July 24, 1981 was improper and exemplified character traits undesirable in an AES employee.

Boone testified that he heard the word "nigger" as he was walking away from a conversation with Mr. Elliott but, that he was walking toward a barn to see a feeder pig operation and that he did not hear anything further, Elliott claimed that Coley had not only offended him by using the word nigger, but he heard him say that "I wasn't going to place him first" and wrote Downen accordingly in his July 27, 1981 letter, *supra*.

It is clear and undenied that if Elliott had questioned Coley about what he had heard or later investigated the facts he would have found that Coley did judge the district competition and in fact awarded a black youth from Tipton County the grand champion lamb prize (testimony of Turner, Coley, and Exhibit #16).

It is my opinion that Downen's disciplinary action as outlined in his November 5, 1981 letter, *supra*, to Elliott was proper under the circumstances. Therefore, I find that employee's profane response to what he perceived as racially discriminatory speech and his subsequent false accusations against Coley are unjustified and not

protected freedom of speech under the Constitution. *Chaplinski, supra*; *McGill v. Board of Regents of State of Florida, supra*, and evidenced traits undesirable in an AES employee, *Weisbrod v. Donigan, supra*.

6. *Charge of Violating Work Rule #4 - Leaving Work Prior to End of Work Period and Repeated Failure to Inform Supervisor When Leaving a Work Station or Work Area*

There are 27 University work rules under which The University operates. Section 500 of the UTIA Personnel Procedures Manual provides that behavior described in those rules on the part of employees of the UTIA will result in disciplinary action up to and including immediate discharge (Exhibit #76). Work rule #4 provides as follows:

Failure of employees to report to their work place at the beginning of their work period. Leaving work prior to the end of their work period. Repeated failure to inform the supervisor when leaving a work station or work area. . .

T.C.A. 4-5-314(4), provides:

Findings of fact shall be based exclusively upon the evidence and record in the adjudicative proceeding and on matters officially noticed in that proceeding. The agency members experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

Drawing on my own experience and understanding of the extension organization, I recognize that while normal working hours are from 8:00 a.m. to 5:00 p.m. Monday through Friday, there must of necessity be some degree of discretionary flexibility in working hours for professional em-

employees in order to effectively serve their clientele. Although both Downen and Shearon testified that compensatory time as such is not an official policy of the AES it is undisputed that the nature of an extension agent's work is such that it often requires him to make contact with his clientele before and after hours and to conduct meetings and other after hours work-related activities. It was also undisputed in this hearing that an extension agent is professionally trained and expected to carry out his work responsibilities as a "professional" and that this requires a great degree of self-supervision (testimony of Downen, Turner and Shearon). While the University system, including the Institute of Agriculture, officially sanctions "flex-time" which at the option of the respective division heads, allows employees where feasible to adjust their working hours between the hours of 7:00 a.m. and 6:00 p.m., the official working hours of the AES is still 8:00 a.m. to 5:00 p.m. However, again due to the nature of a professional extension worker's job related responsibilities, although permission to report to their work place late or to leave work prior to the end of the work period is not an established policy, it is permissible professional discretionary conduct in established practice throughout the AES organization. There was no substantial proof offered by employer that Elliott abused this discretionary privilege as it relates to work rule #4. While Shearon testified that he found it hard to keep up with Elliott's whereabouts, very little or no specific proof was offered by the University to prove repeated failure to inform supervisor when leaving a work station or work area.

The University claimed that Elliott returned from an officially authorized meeting at Tennessee State University, Nashville, Tennessee, on November 6, 1981 and falsely turned in on his expense account a claim for reimbursement

for the evening meal. Shearon and Mary Ann Davenport, a secretary in the District One Extension Office, claimed Elliott returned to Jackson in early afternoon of that date. Davenport testified that as she was driving by she saw employee putting gas in his car at a station on Highway 45 By-pass in Jackson on that date between the hour of 3:00 and 3:30 p.m. Shearon testified that he brought this to the attention of Mr. Luck who on investigation stated that he thought Shearon was mistaken, that he thought Elliott was in Nashville all that afternoon. Shearon then wrote Downen suggesting further investigation. Subsequently, employee produced witness Deloris Townsend, nurse and receptionist in the office of Dr. William H. Grant who testified that he had an appointment with Dr. Grant on November 6, 1981 and was in Grant's office at 4:30 p.m. on that date. A letter from Dr. Grant to that effect had been introduced attesting that Elliott was in his office in Nashville, Tennessee at 4:30 p.m. on that date. Dr. Grant was deceased prior to the beginning of this hearing. Two additional witnesses, Andrew Winston and Alvin Wade testified that they saw Elliott in Nashville at approximately 2:30 to 3:00 p.m. on that afternoon (See also Exhibits #57, 58, 104, 105, 106, 107, 130).

Elliott admitted that he missed a staff conference on July 23, 1981 following the Milan Field Day. He testified that he had a headache and went home, laid down and went to sleep, that when called by Mr. Shearon he told Shearon that the hot sun had given him a headache and he was sick and that nothing else was said. If proven that employee deliberately did not return to the office on that afternoon for the staff conference, without an excuse, it clearly would be in violation of work rule #4. However, considering the flexibility permitted in the Madison County Extension Office regarding sick leave, annual

leave and office policy generally, I conclude that this absence was not in violation of work rule #4.

The University also claimed that on July 31, 1981 the employee left the office prior to the end of work hours and proceeded to play golf without permission and without taking annual leave. It was concluded, supra, under the specific charge of playing golf during working hours that employee did in fact play golf at approximately 4:00 p.m. on that date. However, again based on my own knowledge of and experience in extension work and the testimony herein relating to flexibility and professional discretion of employees in handling their job responsibilities, I cannot find this incident sufficient to be in violation of work rule #4.

It is unquestionably important that a supervisor know where employees under his supervision are spending their time and it is his responsibility to evaluate them on the basis of how they spend their time in relation to their job responsibilities. When viewed in the context of an extension agent whose work area includes an entire county it is in my opinion, not feasible or practical for an extension leader to know the whereabouts of the agent at all times during the day. A sign-out policy as initiated by Shearon for the Madison County office in August 1981 serves a useful purpose in keeping the office generally informed as to the whereabouts of the staff. However, I do not believe that work rule #4 was intended to restrict the freedom of movement of professional employees nor limit their professional discretion in fulfilling their work responsibilities, but is to be interpreted in accordance with the nature of the work. While I do not think it is feasible or practical for an extension leader to know the exact whereabouts of an extension agent under his supervision at all times as it might be when the work area

is confined to a specific location, an agent's job assignments should be such as to enable his supervisor to determine whether or not he is leaving his work station or work area repeatedly without authorization. I find no conclusive proof that Elliott repeatedly left his work station or work area. Accordingly, it is my overall finding and conclusion that the University has not satisfactorily met its burden in proving employee in violation of work rule #4.

7. Charge of Unauthorized Use of Telephone Violating Work Rule #22 - Charging Personal Telephone Calls to the Madison County Extension Service Office Telephone

The charge of violating work rule #22 was not included in employer's initial charges outlined in Downen's letter of March 1, 1982 to Elliott (Exhibit #118) but was added later in employer's response to employee's motion for a more definite and detailed statement of the issues. University work rule #22 provides as follows:

Using University telephones for personal calls without permission except in an emergency or charging personal calls to the University.

Employee admitted that he had made personal long distance calls and charged them to Madison County Extension Office phone, but had paid for most of them. As an offer of proof there was a policy against charging long distance calls of a personal nature to the office phone, employer introduced a memorandum from Bob Whitworth, former Madison County Extension Leader, to the Madison County extension staff dated June 26, 1974 (Exhibit #32) which provides as follows:

Due to the accounting system of the county and the telephone company, as of this date personal telephone

calls may no longer be charged to our office phone. Persons answering the telephone are asked not to accept charges for "collect" telephone calls in the future.

Shearon testified that he remembered seeing this memorandum in reviewing "the administrative files" sometime after he came to the county. He further testified that later he learned from a secretary that Elliott had used the telephone for personal calls and wanted to pay for them, that she had reminded him that this practice had already been stopped and that the Whitworth memo was again reviewed. Shearon could not recall whether he reviewed it personally with Elliott or reviewed it in staff conference, but indicated that he did ask Elliott not to make such personal calls and that Elliott said he would not and that to his knowledge he had not been doing it until he discovered he had begun the practice again recently. Employer offered no additional proof to show that the Whitworth memorandum had been brought to the attention of employee or other members of the Madison County staff, or that he ever instituted such a policy himself, or made an effort to periodically check to see if any unauthorized calls were being made by any of his staff prior to the initiation of proceedings against employee in this hearing.

Shearon testified that he learned about employee's personal long distance calls by accident, when he saw a notation on the telephone bill which,

Showed county part so much, personal so much, and a check" and I asked about the check, and I was informed that Mr. Elliott had given a check to, to pay this bill, and then I became concerned and started checking and found out that this had been going on for some time, unbeknownst to me, that Mr. Elliott had been making some payments.

Shearon further testified that some of the calls Elliott paid for and some he did not pay for between May 18, 1981 and March 4, 1982, that,

Even when they are paid for, *the agent's time is spent on, personal matters*, and something other than extension business by virtue of making these phone calls and certainly when they are not paid for, they are certainly not acceptable. (Emphasis added)

Judy Warren Matlock, a former staff member in the Madison County office, testified that about everyone in the Madison County office had made personal long distance phone calls and paid for them when the bill came in and that it had not appeared to be a problem while she was so employed. Similar allegations were made by employee, but no specific proof was offered. University work rule #22 prohibits using University telephones for personal calls without permission except in an emergency. However, it was undisputed that Shearon allowed all Madison County extension employees to make local personal calls, including himself. Furthermore, the Whitworth memorandum also shows that it has not been a custom for a long time to strictly follow a policy of no personal calls, local or long distance.

Whether call local, or call long distance and pay later is customary or not is not the issue. However, what has been and what was custom in 1981 and 1982 in the Madison County Extension Office relative to phone calls may be taken into consideration relative to what disciplinary action should be taken under such circumstances if violation of work rule #22 in fact occurred (See Exhibits #33, 34, 65, 66, 68, and 76).

Findings of Fact shall be based exclusively upon the evidence of record. However, the agency members expe-

rience, technical, and specialized knowledge may be utilized in the evaluation of evidence, T.C.A. 4-5-314 (4), supra. Nist if the long distance calls made by Elliott were made to his legal counsel after these proceedings were initiated. Elliott claimed that he felt justified in using the extension office phone to call his attorney because Shearon admittedly had used the same phone to call his attorney in the University's General Counsel's office and that he also called Dean Downen about matters pertaining to this hearing after hours. Elliott testified that his counsel advised him that "we don't want to be caught in the position . . . we did wrong but you did wrong too, so you go pay the calls and that's what I did."

Although such a finding may appear harsh under the circumstances, the fact is undisputed that a number of personal long distance calls were made by employee from the Madison County AES phone and whether or not they were ultimately paid for by employee, University work rule #22 was violated. The charge is therefore sustained.

While the factual circumstances related, supra, do not constitute a justification or excuse for employee's actions, but within keeping with the reputation of The University of Tennessee for its integrity and sense of fair play, may be considered as extenuating in prescribing a remedy.

8. *The Charge of Violating the University of Tennessee Institute of Agriculture Work Rule #25, Insubordination or Refusal of Employee to Follow Instructions or to Perform Designated Work Where Such Instructions or Work Normally and Properly May Be Required of An Employee*

Specifically, employer charged that employee consistently refused to carry out his supervisors instructions as follows:

1. To complete the small farm group surveys and feeder pig producer surveys.
2. To carry out his assignment in the Cyprus Creek watershed, and other assignments.
3. Employee failed to appear at a calf sale on October 8, 1981.
9. *The Charge of Inadequate Work Performance in That Employee Failed in a Timely and Proper Manner to Complete Assignments Given to Him Pursuant to His Job Description, and Failed to Carry Out Instructions Given to Him By His Supervisors*

The charges relating to work rule #25, and the charge of inadequate work performance are similar and interrelated. Therefore, charges #8 and #9 are dealt with concurrently, infra.

Under the UAPA an agency is required to admit evidence normally admissible in court but, if necessary, evidence not admissible in court may be admitted T.C.A. 4-5-13 (1). In *Lettner v. Plummer*, 559 S.W. 2d 785 (Tenn. 1977), the court said:

Evidence in contested cases is not strictly limited to that which is admissible in court under traditional rules but "may also admit evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs".

Also, the UAPA creates a substantial and material evidence rule. Thus, in administrative proceedings all evidence is competent and may be considered, regardless of its source and nature, if it is the kind of evidence that "a reasonable mind might accept as adequate to support a conclusion." Competency of evidence therefore, for pur-

poses of administrative agency proceedings rests upon the logical persuasiveness of such evidence to the "reasonable mind" to support a rational construction and furnish a reasonably sound basis for the action under consideration. *South Central Bell Telephone Company v. Tennessee Public Service Commission*, 579 S.W. 2d 429, 440 (Tenn. App. 1979). The U.S. Supreme Court has stated that substantial evidence is "more than a scintilla", such relevant evidence as a reasonable mind might accept as adequate to support a conclusion—not "uncorroborated hearsay or rumor", *Consolidated Edison C. v. NLRB*, 305 U.S. 197, 59 S. Ct. 206, 83 L.Ed. 126 (1938). *C.F. Industries v. Tennessee Public Service Commission*, 599 S.W. 2d 536, 540 (Tenn. 1980). See also T.C.A. 4-5-315 (4). The purpose of this rule is to preserve the autonomy of the administrative process in deference to the agency's expertise and experience.

Whether or not charges are supported by material or substantial evidence is a question of fact, whereas whether or not an agency is acting within its statutory authority is a question of law.

An agency, acting upon pure speculation, cannot ignore uncontradicted material evidence and refuse to give any weight or consideration to it, if such evidence is of the kind of character that would naturally be expected to produce a more favorable ruling if considered.

Uncontroverted material evidence cannot be ignored. The rule was well stated in *South Central Bell Telephone Company v. Tennessee Public Service Commission*, *supra*, as follows:

Furthermore, it is a well-settled rule if a party knows of the existence of an available witness on a material

issue and such witness is within his control, and if, without satisfactory explanation, he fails to call him, the . . . (Court) . . . may draw the inference that the testimony of the witness would not have been favorable to such party. 49 *American Jurisprudence 2nd* (Evidence, Sec. 180) at p. 224. See also *Culburtson v. Southern Bell*, 18 HOW. (U.S.) 584, 15 L.Ed. 493; *National Life and Accident Insurance Company v. Edgings*, 188 Tenn. 512, 221 S.W. 2d 695 (1949).

These rules, in my opinion, are applicable to this administrative hearing and the issues relating thereto. If it can be found that the agency, the AES in this case, has acted in good faith and not in an arbitrary or capricious manner, or otherwise abused its discretion and has followed a clear path of reasoning and can show a rational basis for its charges, then its position must be sustained.

The UAPA establishes the minimum quantity of evidence and the preponderance of evidence standard of proof for administrative hearing adjudication proceedings. This may not be determined by the number of witnesses but by the greater weight of all the evidence or more convincing than the evidence which is offered in opposition to it. See also *Steadman v. Securities Exchange Commission*, 101 S. Ct. 999 (1981), *supra*.

Employer's offer of proof on the charge of inadequate job performance was primarily directed at employee's primary job assignment in agricultural programs and more specifically his assigned responsibility in the small farm family program.

Elliott is an AES employee with 15 years service, all of which have been served in Madison County. It is undisputed by Elliott's supervisors Shearon, Turner, and Downen that he is not only capable of doing excellent

work, but that he has in fact accomplished a lot of good work with small farmers and other clientele in Madison County. Moreover, while he was not called to testify, Elliott's District Supervisor Luck, who is responsible for officially rating AES employees in District One, subject to the approval of the AES administration, rated Elliott's performance as average or above every year since he became supervisor in 1977 through June 30, 1981.

In testifying as to his familiarity with Elliott's work Downen said:

It, up until June 1981, it would be about average for all the agents in the State who have been with us 15 years or so, as Mr. Elliott has.

He further testified that he had not been informed about any problem with Elliott's performance until after the Murray and Coley incidents came up, that his knowledge of individual agent's activities generally would be superficial, but that he understood what programs were going on in the aggregate on a county and district basis through normal reporting channels,

But in terms of what agents are doing on a day-to-day or even a week-to-week or even a monthly basis, I do not know. *Mr. Elliott has a job description that describes what he is expected to do, in the area for which he is responsible. Mr. Shearon supervises that, and then, Mr. Shearon as the county extension leader, is responsible to the district supervisor. The five district supervisors in the State answer to me, therefore, two layers of supervision are between me and Mr. Elliott. (Emphasis added)*

It was stated, supra, that in Tennessee when a county agricultural extension committee makes a recommendation affecting the employment status of an agent, the dean

of extension may accept or reject the recommendation. This final authority has been delegated to the dean of the UTAES by the secretary of the U.S. Department of Agriculture, T.C.A. 4-9-3406, supra. It is clear that a county agricultural extension service committee has no authority to act in any capacity on extension-related matters outside its own county. Furthermore, I can find no precedent in the State of Tennessee whereby a county agricultural extension committee has made recommendations relative to an agent's employment status based on job performance. Under normal circumstances and logically, action resulting in the removal of an agent from a county on the basis of inadequate job performance would be initiated and recommended by the agent's supervisors who are in a position to evaluate performance according to established AES policy and procedure.

According to UTIA AES established policy of procedure a system of "progressive discipline" (Exhibit #117, supra), "shall" be followed. In my opinion, the system of progressive discipline does not necessarily apply in all cases in the removal or transfer of an agent from a county into another position. The termination of an agent on the other hand, can only be accomplished by strictly adhering to the well-established policy and procedure of the UTIA AES. It was stated, supra, that the purpose of "progressive discipline" is to correct improper behavior and/or inadequate performance. The related issue will be addressed specifically, infra.

This case is unique in the sense that employee Elliott has been charged with both improper and/or inadequate behavior and inadequate performance. On August 28, 1981 Mr. Billy Donnell, chairman of the MCAEC, wrote to Dean Downen (Exhibit #111) as follows:

The Madison County Extension Committee met last night, August 27, 1981, for its regular meeting, and

also to take up the matter of Mr. Robert B. Elliott as was requested by the committee in a special meeting held August 17, 1981, in the Agricultural Complex. All members of the committee were present at both meetings. I have attached copies of the minutes of the August 17th meeting and also a copy of the secretary's draft of the minutes of the August 27th meeting and apologize that she has not had the opportunity to write up the final copy yet.

The Madison County Agriculture Committee passed a resolution stating that Robert B. Elliott is no longer effective in his position as assistant extension agent with the agriculture extension service because of insubordination and because of the incidents mentioned in the meetings and in the letters attached as exhibits to the minutes by the secretary. The actions in question were the occurrence on or about June 18, 1981, in the offices of Murray Truck Lines, Inc. in Jackson, Tennessee, and the incident which occurred at the Madison County livestock field day on or about July 24, 1981.

Incidents of unacceptable job behavior cited at the meeting by Mr. Shearon and by other persons present were Mr. Elliott's refusing or failing to maintain and produce mileage records; his refusal or failure to keep the office clearly informed of his whereabouts at all times; his failure to complete a survey of small farmers throughout the county for the purpose of determining how the extension service could be more helpful to them; his failure to set up a file on each small farmer and work up a farm plan with five or six farmers each year; his failure to work up a sample farm plan on farms with sales under \$10,000 to use in presenting a program to the county agricultural committee and

his failure to take over the feeder pig program and to develop newsletters and other educational materials to be given out to the feeder pig producers in the small farm group and to attend the feeder pig sales on a regular schedule so he could get to know the producers better and help when the sales were needed, all of the above as requested by the extension leader. He was also cited for failure to attend a scheduled staff conference.

The resolution that passed stated "because of insubordination and because Mr. Elliott cannot be effective in his position, this committee recommends to The University of Tennessee Extension Service that Mr. Elliott be removed from service in this county and the committee requested the Dean of the Agricultural Extension Service of The University of Tennessee, Institute of Agriculture, to take the appropriate action.

If you have any further questions or need further information from us, please feel free to write me or Mr. Shearon or call us at any time.

As indicated in Mr. Donnell's letter, all members of the MCAEC were present. The minutes, introduced by employer as Exhibit #42, indicated extension personnel present at the August 27th meeting were Curtis Shearon, Robert Elliott, Judy Cloud, and Johnny Butler. Elliott testified during the hearing that District Supervisor Luck was there, but left the meeting early. The minutes provided in part as follows:

Many character witnesses spoke in favor of Mr. Elliott.

Mr. Shearon gave a written report concerning Mr. Elliott's work habits and lack of cooperation. The report is attached to the minutes.

Chairman Donnell read several letters concerning Mr. Elliott. These letters are also attached to the minutes.

Mr. Tom Korwin and Mr. Steve Murray of Murray Truck Lines were in the audience. They commented on the letter Mr. Korwin sent Dean Downen. An employee of Kelly Tubbs Cabinet Shop, which is next door to Murray Truck Lines, also entered the discussion.

Field day participants, Tommy Coley, Mr. Gary Boyette, Mr. Willie Boone, Mr. Paul Bond and Mr. Shearon were heard.

After a lengthy discussion, Mr. Arthur Johnson made the following motion: because of insubordination and because in my opinion, Mr. Elliott cannot be effective in his position, I move that this committee pass a resolution of recommendation to The University of Tennessee Agricultural Extension Service that Mr. Elliott be removed from service of the county and that the committee request the Dean of the Agricultural Service of The University of Tennessee Institute of Agriculture to take the appropriate action.

The motion was seconded by Mr. Jimmy Hopper. The motion carried four to two.

The letters referred to in Donnell's letter and in the August 27, 1981 minutes, including the Korwin letter to Downen and the Elliott to Downen letter relating to the July 24, 1981 field day incident, were introduced in evidence at various stages of this hearing and discussed herein where deemed appropriate and significant to the findings and conclusions related thereto.

Shearon testified that he gave his report to the MCAEC because he felt it was time for them to "make a determina-

tion" about Elliott. It is clear that the MCAEC has no statutory authority to "determine" whether or not an agent's employment with the AES will be terminated. Although that committee, as are all county committees, is an advisory body and the crucial issues in this hearing relative to performance and termination do not hinge on what the committee said or did, harmony must exist between the AES and county committees. Obviously, on the question of removal of an agent from a county where county appropriations are involved, committee recommendations must be considered and acted on objectively in order to maintain harmony. In this case, Shearon reported to the AMAEC on Elliott's behavior before any official action was taken on reprimand given to Elliott relative to his performance. The evidence of record reflects that the chairman of the MCAEC, Mr. Donnell, had asked Shearon to appear before the committee on August 27, 1981 to give a report on Elliott's behaviour and performance. Whether it was requested or given voluntarily, it is clear that the extension leader here did go before the MCAEC and relate to them information reflecting poor job performance before the agent, Elliott, was officially reprimanded. To the contrary, Luck had rated him highly, 3.0 or above up through June 30, 1981 and if he was in fact present on August 27, 1981 he said nothing nor did anyone say anything before that committee about the ratings or justify why they were making these statements when they in fact had given him official ratings of 3.0. This reflects an obvious breakdown of communications between Shearon and his supervisors and the extension administration. Now, later in Downen's December 5, 1981 warning letter to Elliott, supra, after he had "investigated" the Coley incident, he warned Elliott in writing about his behavior, referring to both the Murray and Coley in-

cidents. While Downen's August 5, 1981 letter to Elliott referred to both behavior and performance, it cannot be construed to be in reference to any past behavior at that time, but related specifically to the Murray Truck Lines incident. Employer claimed that Elliott had been given numerous oral warnings about his performance since 1976, and more specifically by letter on February 13, 1980 (Exhibit #24, supra). I can find no substantial evidence in the record to show conclusively that Elliott was ever officially warned or otherwise notified that his performance prior to the August 27th meeting was not satisfactory according to AES standards.

Furthermore, Downen's November 5 letter stated that "... is the type of improper behavior that can lead to further disciplinary action". This was on November 5th and implies that Elliott is only being warned here and that he still has an opportunity to correct his behavior. While Elliott is told that his behavior must improve, no time frame in which he needs to improve was given. The implication, however, was immediately; "no further abusive outbursts will be tolerated". Within six weeks, on December 18, 1981, Downen wrote his termination letter, supra. I can find no evidence of record that there were any further incidents of improper behavior by employee during this period of time.

The findings and conclusions herein must finally relate specifically to the actions of the AES and not the MCAEC. However, while normally disciplinary matters relating to an extension agent's job performance are resolved within the AES organization, without initial county involvement, the record reflects that the incidents at the Murray Truck Lines and Madison County field day prompted the MCAEC to meet August 17, 1981 and subsequently on August 27, 1981. While it should be kept in mind that the Madison

County Committee is an advisory body it is also apparent that its response to the Murray and Coley incidents and to Shearon's report influenced Downen's decision to propose Elliott's termination.

Downen testified that he personally interviewed each member of the MCAEC individually and separately and that he concluded that although some members of the committee related that the Murray and Coley incidents influenced their vote, their primary reason for voting to remove Elliott from the county was based on his performance as an extension agent. Both Donnell's letter to Downen and the minutes of the August 27, 1981 meeting of the MCAEC, supra, indicates that their recommendation was based on both behavior and performance. It is further evident that Shearon's written report to the committee had a significant influence on the vote. That report was submitted in evidence by employer as Exhibit #41 and provides as follows:

This is certainly not a pleasant task. It grieves me greatly to make the remarks I am about to make.

For the past five years, I have put forth a great effort to work with the Madison County Extension staff, the county agricultural committee, the county judge and the people of Madison County. For the most part, this has been a very pleasant and rewarding experience.

However, in view of many things that have happened and more especially, what occurred July 23 and 24, *I find it most difficult to work with Associate Extension Agent, Robert B. Elliott.*

Mr Elliott was a tour leader at Milan on July 23rd on one of the buses going to the machinery demonstra-

tion. When he returned from his first tour, he came by the registration tent where I was assisting. I asked him how the tour went and he said it would have been ok if some of "them dudes" would do what they are told and then he went on and made a special note about the people on the bus from Madison County being the worst of all. I do not know who was on the bus from Madison County and did not ask.

I had a staff conference scheduled for 1:30 p.m. to 2:00 p.m. that afternoon (July 23, 1981), or as soon as we could get back to the office from the field day. It rained and we left early. John Butler and I were back between 1:00 p.m. and 1:30 p.m. Miss Cloud was there and ready for conference. We waited until about 2:30 p.m. and still had not heard from Mr. Elliott. I finally decided to call his home and asked Miss Cloud to dial his number. He was at home. He stated he had a headache and decided not to come back to the office. I asked him if he remembered the conference. He said that he did, but didn't feel like coming. He made no explanation as to why he did not call to inform us of his illness.

On Friday, July 24, 1981 at the Madison County Livestock Field Day he left about 1:15 p.m. without participating in the tour and helping move the tables, chairs, etc. back to the office. He became upset over a conversation between Mr. Tommy Coley and Dr. Jim Neel. He came by where I was and in the very foul language said he was going to the office. I asked him what was wrong, but didn't get a clear answer. He was cursing someone and I thought he said something about being called a negro boy. I later found out from Mr. Coley that Mr. Elliott had very rudely interrupted a conversation between he and Dr. Neel.

He had accused Mr. Coley of making racially biased decisions in livestock judging, and had vehemently cursed Mr. Coley.

A few examples where we have not agreed are:

1. Asking him to set up a file on each farmer and work up a farm plan with five or six farmers each year.
2. When the 1974 ag census came out I went over it with him and asked him to take the information on farms under \$10,000 and make up a sample farm plan to use in presenting a program to the county agriculture committee, and also, explain to him that it could be used as an approach when encouraging small farmers to plan and make improvements.
3. In 1979 we were offered an opportunity to employ a program aid to visit and survey small farmers throughout the county for the purpose of determining how extension could be more helpful. Dr. Turner left it up to me and Mr. Elliott as to whether or not we employed an aid or whether he did the survey. I talked it over with him and he said that he would do the survey. He seemed interested and therefore, we did not employ anyone. On numerous occasions, I asked him about the survey and received many evasive answers. No completed surveys have ever been turned in.
4. After Mr. Butler was given extra assignments in connection with RMC program, I asked Mr. Elliott to take over the feeder pig program. Almost all of the approximately ninety feeder pig producers are in the small farm group. I suggested that he develop newsletters and other educational ma-

terial and send it to them on a regular basis. I also suggested that he attend sales on a regular schedule about (about once a month) to get to know the producers better and to help with the sales when needed. This suggestion has been largely ignored.

5. Mr. Elliott is a good writer and I have told him so many times. He started writing for the Jackson Journal when it began publication and was doing a good job for a few weeks. After missing his column for several weeks, I encouraged him to resume. So far, he has not done so.
6. Probably the most perplexing aspect of working with Mr. Elliott is his refusal to keep the office clearly informed of his whereabouts at all times. It is a policy of the extension service that agents leave word with the secretary concerning their destination while out of the office and the time of return. I feel this is important, and have repeatedly stressed it in staff conference and individually. It is very common for Mr. Elliott to leave the office before mid morning saying he was going up town, or to check a lawn. He seldom if ever, tells when he will return. Sometimes he will return for varying lengths of time and then leave again. Often, however, he does not come back into the office at all.

On December 9, 1981 Shearon wrote to Elliott informing him that:

By copy of this letter I am advising Dr. M Lloyd Downen, Dean of the Agricultural Extension Service, that I consider your overall performance to be inadequate for this calendar year. (Exhibit #59a)

In Downen's letter of December 18, 1981 introduced as Exhibit #115, supra, Downen informed Elliott as follows:

I have received a copy of Mr. Curtis Shearon's December 9, 1981 letter regarding your job performance in which Mr. Shearon states that your overall job performance has been inadequate for this calendar year.

As you know, I have personally given you two written warnings this year regarding your job behavior and performance. Moreover, as you also know the Madison County Agricultural Extension Committee has recommended to me that you be removed from Madison County due to your inadequate job performance.

Downen testified in both direct and cross-examination repeatedly that based on his interviews with county committee members he concluded that although some of them said the Murray and Coley incidents had some influence upon their vote, the primary reason given for those voting for the resolution to remove Elliott from the county was based on inadequate job performance. Again, in considering both his testimony and official communications with Elliott it appears evident that the committee recommendation was weighed heavily in his decision but goes a step beyond that recommendation as conveyed to Elliott in his December 18, 1981 letter, supra, as follows:

Due to the serious allegations and incidents of inadequate job performance and inadequate job behavior which have continued this year, *I have decided to propose that your employment with the University of Tennessee Agricultural Extension Service be terminated for inadequate job performance and inadequate job behavior.* (Emphasis added)

Moreover, it is apparent from the foregoing that the committee recommendations relative to performance was based on the information provided them by Shearon.

Although the county committee involvement in this situation relating to and employee's performance appears to set a precedent which based upon my own knowledge and experience as a member of the UTIA staff and former AES staff member may be questionable, I do not find it necessary to attempt to second guess the dean of extension in this respect. The fact remains that employer AES has brought charges of improper and/or inadequate behavior and inadequate performance against employee, Elliott. Those charges and the issues relating thereto are dealt with separately herein and the charge of inadequate job performance must now be dealt with.

As stated above, employer's proof of inadequate job performance was directed in an effort to show employee's failure to fulfill his primary job assignment in agricultural programs, more specifically his assigned responsibility in the small farm family program.

As an offer of proof Shearon testified that when he came to Madison County in 1976 that Elliott's primary job assignment was in the area of agriculture with the primary responsibility of working with small farmers throughout Madison County. He further testified that having come from a demonstration county and very much interested in that type of teaching, suggested that Elliott summarize the 1974 agricultural census data and develop a "benchmark plan", to be used to show other farmers what could be done to help them in better utilizing the resources available to them and to have it prepared to present at a county ag committee meeting. Shearon said the plan could have easily been done in one week but testified that such a plan had not been completed as yet. Elliott testified that he had started a plan with one farmer but before it could be fully implemented the farmer left farming, that he had tried to get others interested but

indicated that it is very difficult to develop a sophisticated farm plan with a farmer who can hardly read or write. He did indicate also that he did not like to do farm planning and that he felt it more appropriate for the type of farmers with whom Mr. Butler works. There was no offer of proof by employer that any official reprimand was ever given Elliott for his failure to develop the "benchmark data".

It was undenied by Shearon, Turner and Downen that Elliott was doing a good job when Shearon came to the county in 1976 and that he had been doing a good job each year since he came to the county some ten years prior to that time. Furthermore, his MBO ratings were above average for all of those years. Based on this, it must be presumed that in the judgment of his supervisors that he had a reasonably good knowledge of the needs of the small farmers in Madison County. Furthermore, while Shearon testified that this was an assignment never completed, I am of the opinion that, based on his own experience with test demonstration programs he was making a good faith effort to assist Elliott in improving his program assistance to the small farmers of Madison County rather than making a direct assignment. If this was not the case, it would have been a simple matter for Shearon to have put the assignment in writing, with a copy to Turner or at least made it clear that the assignment was to be completed within a period of time. Subsequent performance ratings further indicate that this was not considered a problem of sufficient significance to require a reprimand either from Shearon or district supervisors.

Shearon testified that Elliott possesses "very excellent capabilities, as good as most people I have worked with, and when he is personally interested in an assignment he can do a very good job, but when Mr. Elliott does

not like an assignment, it is very difficult to get him started and more difficult to get him to complete an assignment". Again, it appears that a simple supervisory solution when a supervisor is alerted to a potential problem of this nature would be to make a specific assignment, give a reasonable deadline, and if not completed within that deadline take appropriate steps to correct the problem, including a reprimand and beginning a clearly outlined disciplinary procedure if necessary, always keeping supervisors informed and seeking their advice and counsel as needed. Generally, when potential problems or problems are not specifically dealt with, rather than going away they become more difficult to handle later.

Shearon testified that Elliott's lack of planning persisted in spite of his "efforts to motivate Mr. Elliott to begin the planning process for the small farm program."

Employee produced some 90 witnesses who testified relative to the services he had performed for small farmers and others in Madison County from the time he first came to the county up to and including the date of their testimony during this hearing. Although most of them were credible witnesses who testified favorably relative to Elliott's job performance, it is a well-established rule that it is not the number of witnesses that is important but the quality of the witnesses testimony that carries the most weight. Evidence shows that Elliott did a lot of good work and there's no argument or disagreement that he is quite capable of doing good work, in fact, much better work than he had been doing.

The AES organizational structure clearly provides for line supervision of employees at all levels. Within the framework of the organizational structure the role of self-supervision by an employee, though he is a professional

and should at all times perform and conduct himself as a professional, does not substitute for line supervision or relieve line supervisors of their professional responsibilities to supervise employees below them in the line of the organization, to evaluate them and ultimately to provide direction in areas where improvement is needed based on those performance evaluations.

As indicated, supra, the UTAES follows the MBO system of evaluating performance of its agents. Performance ratings of county professional employees are recommended by county extension leader to the district supervisor usually sometime in February of each year. The supervisor then assigns an official rating for that fiscal year which carries through June 30th and with the final approval of the State extension administration including the dean of extension, employee is formally notified sometime in July of his rating for the fiscal year ending that June 30th.

In support of its charge of inadequate job performance employer introduced Institute of Agriculture, University of Tennessee professional personnel rating forms for the years 1976 through 1981 which represented Extension Leader Shearon's recommended evaluations for Robert B. Elliott for those years as less than desirable (Exhibit #18). For those same years employee was rated 3.0, or above which is average, by District Supervisor Luck who has the authorized responsibility for assigning official ratings for the AES in his district, with the exception of 1976 for which year Elliott received a 4.0 rating from Luck's predecessor, H. T. Short. Throughout the hearing employer relied on Shearon's evaluations and testimony, ignoring Luck's official ratings for those years (Col. Exhibit #64). This will be addressed more specifically,

infra. For the time being we will take a closer look at Shearon's evaluation of Elliott's job performance. Keeping in mind that the MBO rating scale ranges from 1.0 to 5.0 with a rating of 2.5 to 3.5 considered an acceptable and satisfactory rating. Ratings above 3.5 are considered beyond acceptable standards and a score of 1.6 to 2.4 is marginal. A rating of below 1.5 does not meet minimum standards. In 1977 Shearon recommended an average rating of 2.6 for Elliott. For planning which is one of 10 categories on the form, Elliott was given a rating of 3.0 (Exhibit #18).

Keeping in mind that employees are rated on a fiscal year basis, with the rating process beginning with recommendations from the extension leader in the latter part of February with the agent finally being informed of his official rating sometime after June 30th of that year, Shearon's recommended ratings for Elliott for the years 1978 through 1981 were 2.5, 2.4, up to 3.1 in 1980 and back down to 2.2 in 1981 (Exhibits #19, 20, 23, and 31). While Shearon referred to his ratings on a calendar year basis, it is undisputed that an agent's official AES rating begins with the recommendation from the extension leader and is finalized with administrative approval at the end of the fiscal year June 30th (Shearon and Downen testimony, Exhibits #59a, 115). Furthermore, Shearon testified that the rating forms were provided him by Extension Supervisor Luck under cover letter with instructions for him to complete it by a certain date and to be returned to Luck for his use in further ratings of employees of District One. Shearon further testified that he was instructed to study the guidelines which are printed on the back of the rating form, that he had studied those guidelines and was familiar with same. In explaining the guidelines Shearon said:

A satisfactory, average score between 2.5 and 3.5 overall performance meets acceptable standards. Fair, average score between 1.6 and 2.4 overall performance is marginal or less than level desired, not promotable so long as problem or problems prevail. A formal plan of improvement is required and if progress is not made in a reasonable time, the person should be reassigned or replaced.

The guidelines for completing rating form do in fact provide that "a formal plan for improvement is required" for ratings below 2.4. Employer offered Shearon's ratings in support of its charge of unacceptable job performance, Luck's official administratively sanctioned ratings notwithstanding. Even so, Shearon's own recommended ratings were above the 2.5 acceptable standard for every year except the 2.4 rating in 1979 and 2.2 in 1981. I find no evidence of record to show that employee was ever provided a formal plan for improvement as provided in the rating guidelines. An inference can be drawn here that while Shearon may have been making a good faith effort to correct what he perceived as less than desirable performance, he nevertheless recognized that he was bound by the official ratings made at a higher level.

In 1979 by directive from the United States Department of Agriculture to the head of the State Agricultural Extension Services, including Tennessee, a nationwide program designed for reaching small farm families was begun. Dean Downen assigned the responsibility of developing a plan of action for the Tennessee AES to emphasize the small farm family program to AES Associate Dean, Troy Hinton. A plan developed by Hinton provided for benchmark surveys in each of the five agricultural extension districts, to be implemented through the five associate district supervisors in charge of agricultural programs.

Funds were made available to each district to hire five program assistants per district who would under the supervision of the agent in charge of small farm family programs, would take benchmark surveys "of as many farms as practical" in that county (Exhibit #21a). Associate District Supervisor Turner and Extension Leader Shearon both testified that they "asked" Elliott whether or not he wanted to utilize a program aid to conduct the surveys in Madison County. Shearon notified Turner that Elliott desired to participate in the plan of action but wanted to complete the surveys himself without a program assistant. Elliott denied that he agreed to conduct the surveys without the assistance of a program aid.

Now up to this point in time, the testimony of Shearon, Turner and Downen indicated there had been problems, "frustrations and disappointments" in efforts to get Elliott to collect benchmark data, do farm planning, etc.; yet during 1979 when obviously according to proof offered in this hearing, at least Shearon and Turner perceived Elliott's performance relative to "data collecting" to be a problem, when the opportunity to employ a program aid to assist Elliott in getting "needed" information together became available, the decision of whether or not to utilize such an assistant for which funds were readily available was left to Elliott. Turner testified that the completion of this plan of action by the participating counties was "of critical importance" because "this was really an opportunity to intensify program planning data related to the small farm family audience". Considering the importance placed upon completion of this plan by Elliott's supervisors along with previous "disappointments", would it not have been appropriate for Shearon to exercise supervisory authority and insist, and in fact direct that a program aid be employed to assist Elliott? Furthermore,

assuming Turner was aware of the previous problems, which was so indicated by his testimony, should he not have, as Shearon's immediate supervisor called this to his attention? While the related supervisory decisions may have a bearing, whether or not a program aid was used or who was responsible for not using one is not the issue, but rather whether or not Elliott's job performance was unsatisfactory relative to the assignment.

According to plan, surveys under the small farm plan of action were to be completed by June 1979 after which results were to be summarized. Shearon testified that he did not know why "Mr. Elliott did not turn in any survey forms". The question that arises in the mind of this hearing examiner is why not find out "why" at this point in time and issue some specific instructions. There is no evidence of record to show that there was any written document directing Elliott to "get them done" or any official reprimand for not completing the surveys according to the state plan. Turner testified that he held Elliott responsible for the failure to do the surveys and summary for the 1979 plan of action for the small farm program. Turner said "Mr. Elliott is a professional. He has had the responsibility and he knew he had the responsibility for the small farm family audience". Turner further stated that "when one of our agents says they are going to do an assignment we believe they are going to do it". Both Turner and Shearon testified that Shearon, as Elliott's supervisor, worked with him during the survey period reminding him of the assignment and made a sincere effort to motivate Elliott to complete the assignment which Elliott failed to do. It is undenied that neither Turner nor Shearon took any affirmative disciplinary action against Elliott in 1979 for failure to complete the surveys. In a staff conference in 1980 Elliott indicated that he "planned

to continue with the low-income survey that he was in the middle of completing" (Exhibit #25).

In weighing the evidence I conclude that Elliott did understand his assignment to do the small farm survey and it is undenied that the survey was not in fact completed at the time the charges were brought against him. However, it cannot be overlooked that no formal reprimand or disciplinary action was taken against Elliott. It appears there was no serious question of performance raised prior to the Murray and Coley incidents in mid 1981. This is further verified by an official rating of 3.0 by Luck for that year. Wherein lies the "professional" responsibility of the extension leader and program supervisor to see that assignments are completed? At what point should a supervisor exert some authority and direction where problems are "perceived"? If a problem exists with an employee, if disciplinary action is to be taken, it must be taken at the appropriate time. The UTAES organizational structure provides for supervision at all levels up through the dean of extension. Accordingly, in operation, if a problem occurs at the county level and it cannot or is not satisfactorily dealt with, then it should go to the district level, through the state leader for agricultural programs, and ultimately to the dean. Furthermore, this must be handled within the established disciplinary procedure for the UTIA extension organization where terminations are involved, University Personnel Policy and Procedures, Sec. 160, Po 2. As it relates to Elliott's assignment to do the same farm surveys, although the assignment was not performed, the fact that no disciplinary action was taken against him and that it was overlooked as verified by Elliott's official ratings for those years (Col. Exhibit #64), in my opinion, precludes employer from coming back some two and a half years later and picking up or adding this to the charge of poor work

performance. It must be noted that following this period of obvious failure to complete the surveys that on February 13, 1980 Shearon's recommended rating for Elliott was an overall average of 3.1, with an official overall rating of 3.0 from Luck.

Employee is specifically charged with refusing to carry out his assignment in the Cyprus Creek Watershed.

In the minutes of the Madison County Extension Office Conference August 11, 1980 introduced as Exhibit #28, it was reported as follows:

Mr. Shearon mentioned 88 families located in the Cyprus Creek Watershed which could be used for special emphasis with Mr. Elliott. He asked Mr. Elliott to *visit with some of the farmers to see what needs they had which might be worked into the farm management sessions.* He also told Miss Cloud she might benefit from visiting with Mr. Elliott when she had the chance and emphasize her area of extension work which she could offer to these families. The list of families are already compiled. (Emphasis added).

Elliott testified that the Cyprus Creek Watershed area included the communities of Huntersville and Denmark. He further testified that this was an area in which he had done most of his work, an area where a large percentage of the farmers are black. This was undenied by employer. Exhibit #29 contained facts about the Cyprus Creek Watershed and included a list of farmers in the Cyprus Creek Watershed area, some of whom testified in Elliott's behalf at this hearing. (Exhibit #29, testimony of Joe Bond, Richard Chapman, Mrs. Richard Chapman, John Day, Mrs. Martha Merriweather and Glen White). Employee identified several other farmers whom he had

visited including Lewis Anthony, Jimmy Bond, Ivory Bond, Joe Bond, Wilbur Bond, Murray Buntin, Leroy Chapman, Jesse Williamson, Richard Chapman, Amos Freeman, Sain Greer, Wallace Greer, Charlie Hill, Lewis Ingram, William Ingram, Allen King and H. P. Merriweather.

The record shows that in October 1981 Downen informed Shearon that the purpose of the UTIA's disciplinary policy is to inform employees of their inadequate areas of performance and to warn such employees that if improvement does not occur the employee would be subject to further discipline. Downen further advised Shearon that "since his oral warnings had not been heeded" that he should put all further assignments, instructions and warnings in written form so that there could be no misunderstanding or dispute as to whether instructions or warnings to improve performance had been given. On October 21, 1981, following Downen's instructions Shearon wrote to Elliott as follows:

Re: Failure to complete assignment

Sometime ago, I asked you to visit *several* of the families in the Cyprus Creek Watershed. You have failed to carry out my instructions and I continue to be very disappointed with such unsatisfactory job performance. (Emphasis added)

Accordingly, please accept this as a formal written warning that if your overall performance on all assignments does not immediately improve, you may be subject to further disciplinary action. (Exhibit #45).

While this letter implies that disciplinary action had previously been taken relative to performance, I cannot so find from a preponderance of the evidence.

On October 22, 1981, Elliott responded to Shearon's letter as follows:

In reference to your complaint dated October 21, 1981, in reference to Cyprus Creek Watershed project I would like to inform you that there has been a considerable amount of work done in the Cyprus Creek Watershed project, *I have met with families and informed them of the availability of funds. Up until recently, there have not been any projects approved in this watershed area.*

If you would like to visit some of these people that live within this district, I would be happy to let you talk with some of them. Until this effort has been done, I feel that your complaint of failing to complete work in the Cyprus Creek Watershed project is totally unjustified. (Emphasis added)

A comparison of Elliott's response to the initial assignment as reported in the minutes of the August 11th meeting, supra, indicates that there was an obvious misunderstanding of the assignment. Whether or not the misunderstanding was justified or deliberate I cannot say, based on available evidence. However, in any event, this would appear to have been an appropriate time to clarify the assignment specifically. Shearon testified that he understood the UTIA AES disciplinary system. Keeping in mind that this system provides for the "correction of problems" it would appear to this hearing examiner that under the circumstances the extension leader would have placed a high priority on the need for visiting some of the farmers in the Cyprus Creek Watershed area with Elliott as he requested. This would have given him an opportunity to specifically explain further to Elliott what he felt was needed and follow this up with specific written instructions. However, Shearon testified that he did not

visit any farms in that watershed area at that request. Shearon did reply to Elliott's October 22, 1981 letter (Exhibit #48), as follows:

In reply to your letter of October 22, 1981 regarding your work in Cyprus Creek Watershed. As you know, my assignment was that you visit *all farmers* of the watershed area on a systematic basis, completing information regarding their farming program. *This was to be followed with "farm plans" for some of them.*

You have not provided me with any information regarding the situation of farmers in Cyprus Creek. Neither have you presented me with a farm plan that you have worked out with the farmers in the watershed.

Informing families of funds, or *the status of any other project had nothing to do with the assignment you were given.* (Emphasis added). (See also Exhibit #28, supra, re. assignment)

On October 27, 1981 Elliott respond to Shearon's letter (Exhibit #50), as follows:

In response to your letter dated October 26, 1981 there is a correction I wish to make which related to your request that I visit *all farmers* in the Cyprus Creek Watershed. In your last letter dated October 21, 1981 you said you asked me to *visit several*. You did not ask me to visit all farmers in the Cyprus Creek Watershed area, if so, I would like to see that letter. It might have slipped my memory, *however, if you would like for me to visit all farmers in this watershed area, I will make a diligent effort to fulfill your request.* I have visited several farmers in the Cyprus Creek Watershed area.

I have not documented all visits as Cyprus Creek but, have documented them as Huntersville and Denmark. I have dates of this and again if you like to talk to persons in this area about my involvement with them, I will be extremely happy to take you, or set up a meeting to get them to come to you. The last time I tried to take you out to a black farm, we had to go by and check flowers, and another demonstration on the Smith farm and by the time we arrived at Mr. Hill's farm, he was gone. I was also informing you of some progress Mr. Wallace Ivy had made and you replied, you have helped him too much haven't you.

I am confused about what I am supposed to do in that one day you say visit several and a few days later according to your letter, you say visit all. I have visited several but now I will visit all.

Last year we were constantly reminded that our mileage was about to run out and if our mileage ran out we would be off duty or something to this effect and the major part of our mileage should be reserved for the crop season.

I feel also, that since the Cyprus Creek Watershed project was turned down for the second time and extension does not have a direct responsibility in this area, *please let me know how I am supposed to work with these people. I have reviewed their farm plans and have this documented.* (Emphasis added)

It appears that during this period of time from early September up to the time of this hearing that Mr. Shearon and Mr. Elliott spent a great deal of their time writing letters back and forth without very much effort on the part of either to actually communicate. Much of the dialogue not herein included which I would consider as

"nit-picking" and reflected a lack of professionalism on the part of both Shearon and Elliott. It appears at this point that both Shearon and Elliott had lost sight of their professional mission.

All this notwithstanding, the burden of proving that employee failed to carry out his assignment relative to the Cyprus Creek Watershed and/or that he was insubordinate relative to that assignment was on employer. I find there was a lack of clarity in instructions. I cannot determine whether or not Elliott actually understood those instructions. However, the weight of the evidence indicates that he did not and employer through Shearon or his supervisors failed to specifically respond when he so indicated. Furthermore, during this period Elliott's MBO rating was 3.0 or above which unquestionably reflects that officially his performance good or bad, was officially sanctioned as satisfactory. Therefore, by a preponderance of the evidence, I cannot sustain the charge.

In further support of its charge of violation of work rule #25 in that employee failed to appear at a calf sale on October 8, 1981 employer introduced as Exhibit #51 a letter from Shearon to Elliott dated October 27, 1981 as follows:

On Thursday, October 8, 1981 at 9:45 a.m. Mr. Pettigrew told me that you had called Mrs. Lue Allie Jones and asked her to inform us that you did not feel like working at the calf sale, since you spent the night in Memphis sitting up with a sick friend. I assumed you were taking sick leave.

Since that time I have learned that you were at the office in two different trucks. I also noted that you went to Pinson and Denmanr according to your F-12. The sign-out sheet says you left the office at 9:15

with destination (W.H.-Spray Equipment W/Fox) I assume this means you went to Woodland Hills Country Club to do something about spray equipment with Mr. Fox. Expected return time was 12:00. At 1:30 p.m. you signed out to go to (Denmark-Sylvester) with return time 3:30 and at 3:30 p.m. you signed out (downtown-Haywood) with return time 5:00 p.m. Mr. Elliott if you did not feel like coming to the calf sale then, you should have called the livestock center and called to clear it with me.

Please explain to me how you were able to drive the different trucks without leaving the county.

I consider your performance on this day to be inadequate since you did not come to the calf sale when clearly you were able to do so. (Emphasis added).

It was established that the sale referred to was in Haywood County, Mr. Pettigrew being extension leader in that county. Shearon testified that he wrote Elliott about the feeder calf sale on October 8 because Madison County farmers market calves through the area feeder calf sale which is the "Brownsville Feeders Association", located near Brownsville, Tennessee and that "we assist with that sale", commenting that we, meaning the extension agents of the surrounding counties from Haywood and surrounding counties. We assist he said "because that is our, part of our responsibility as agents in working with farmers through the beef cattle marketing program." Testimony from Shearon, Butler and Elliott agreed that while agricultural agents from the surrounding counties generally assisted in both feeder calf and feeder pig sales, that all agents did not always attend each sale for various reasons, and though agents were expected to be there, attendance was voluntary and not mandatory. Shearon testified that

upon receiving word that Elliott had called indicating he did not feel like working at the sale that day, that he assumed Elliott was taking sick leave, but later found out that he did not take sick leave and did work in Madison County on that date as indicated in his October 27, 1981 letter to Elliott. Shearon further testified that he wrote to Elliott on that date "because after learning that he had not worked and there was evidence that he had possibly done some personal work that day, I reminded him that this was not proper and appropriate in carrying out of instructions". Elliott admitted on direct and cross-examination that he did work in Madison County on October 8 as indicated on the office sign-out sheet referred to in Shearon's letter, including working with Mr. Fox at Woodland Hills Country Club most of that morning on some spray equipment for the golf greens. Elliott however denied that he did any personal work during working hours on that date.

Based on the testimony of Shearon, Butler and Elliott I cannot find the failure of Elliott to attend the calf sale on October 8, 1981 to be in violation of University work rule #25. I could find however, that working on spray equipment at the Woodland Hills Country Club violated Shearon's direct order, supra, not to answer any further calls for assistance at any of the golf courses did amount to insubordination. However, Elliott claimed and it was undenied that he had in fact made visits to that specific golf course at Shearon's suggestion after Shearon had "relieved him of any further responsibilities relating to golf courses". Furthermore, Shearon's letter of October 27 to Elliott specifically relating to Elliott's assistance to Mr. Fox on that morning, does not mention the impropriety of this visit in relation to his previous instructions or discussions relating to helping and visiting golfing establishments.

According to Black, supra, insubordination may be defined as disobedience to constituted authority; refusal to obey some order which a superior officer is entitled to give and have obeyed and the term imports a willful or intentional disregard of the lawful and reasonable instructions of employer. Failure to follow "direct and specific" instructions of an extension leader by an agent under his supervision would clearly amount to insubordination.

It appears from the evidence, including the testimony of Shearon, Turner, Elliott and others that Elliott has had and continued to have a tendency to "do his own thing", that is, go about his work doing the things that he likes to do and things that he sees as important. This is not to say that an extension agent should not answer calls from citizens for assistance in areas in which he is competent, but that primary responsibilities should take first priority. The evidence presented throughout this hearing, however, tends to support the argument that this has largely been overlooked and condoned for years and although he may have frequently been "called to task" in a "suggestive" manner, strong supervision with specific instructions to improve what appeared to be an apparent problem was lacking. Furthermore, where the assignment was clear and yet not completed his official MBO ratings reflected approval of his work, at least up through June 30, 1981. With this past history in mind and considering attendance at every calf sale was not mandatory for agents from the surrounding counties, I conclude that the evidence is insufficient to support a charge of violation of work rule #25 or a charge of inadequate performance on October 8, 1981.

Employee was also charged with violation of work rule #25, insubordination and/or inadequate work performance in that employee consistently refused to carry

out his supervisors instructions to complete feeder pig producer surveys. Employer introduced as Exhibit #52 a letter from Shearon to Elliott dated November 12, 1981 as follows:

Dr. Turner returned the survey forms and suggested that you continue visiting and surveying small farmers throughout the county. Mr. Luck provided you with forms to do this with. *Please make out a schedule that will enable you to complete about four to six surveys per day.*

Recertification of feeder pig producers needs to be completed between *now and January 1, 1982*. Please make these producers a part of your survey group. (Handwritten note on exhibit - "visit sales from time to time: Huntingdon, Lexington")

I would suggest that you locate feeder pig producers and other small farmers on a county map and work it community by community so as to make the best use of your time and travel allowance.

I am expecting you to get started on this now. *Please report the progress you have made each week.*

If you have any questions concerning this assignment, let me know. (Emphasis added)

Exhibit #52 was introduced by employer, is an official part of this record, and while not introduced to support a finding relative to the October 8, 1981 calf sale charge, supra, it is worthy noting that the handwritten note on the exhibit "visit sales from time to time" in reference to feeder pig sales, feeder pigs being one of Elliott's specific assignments, does tend to support employee's claim that attendance at feeder sales was not mandatory.

Following the introduction of Exhibit #52 Shearon was asked a series of questions as follows:

(Q) What instruction did you give Mr. Elliott in this memorandum to him dated November 12, 1981?

(A) In this memorandum, I am returning some survey forms that Mr. Elliott had turned in to me following an earlier conference.

(Q) He gave you some survey forms?

(A) There were some survey forms that Mr. Elliott said that he had found in his briefcase, that had been done back in 1979; and he gave them to me on October 27th.

(Q) Did you check them out?

(A) I turned them over, I gave them to Dr. Turner because they were part of the survey that was supposed to have been done from January to to June of 1979, of which until that time I had not received any survey forms.

(Q) What did Dr. Turner do with them?

(A) Dr. Turner returned them to me and told me that in the essence of their needing updating, and the fact the original report had been prepared, and that was already completed, asked me to give them back to Mr. Elliott, and to use them along with the other surveys that we were asking him to do at that time.

(Q) What else were you instructing him about?

(A) I told him, instructed him concerning the recertification of feeder pig producers.

(Q) What is that, recertification of feeder pig producers?

(A) Feeder pig producers who sell through the feeder pig sales must be certified as to the fact that they are bonified producers and not traders, are not dealers in hogs; and this is done as a health program. We cooperate with it though, at the request of the state veterinarian and the animal science department.

(Q) What did you ask him to do about that?

(A) I asked Mr. Elliott to visit these feeder pig producers and check their operation, make surveys on them, since most of these would be small farmers; along with his continuing small farm survey visits. (Emphasis added)

Herein, I suggested that he continue to visit small farmers including pig producers, and complete some of this survey work. I tried to further help him by making a suggestion that he locate these producers and small farmers on a county map, and work it community by community so as to make the best use of his time and travel allowance. (Emphasis added)

(Q) Well, did he do that?

(A) He did not turn in any survey forms, week by week as instructed. *I told him to report his progress each week, and by reporting his progress, I wanted those survey forms turned in to me.* He did not. Some weeks later, I think you will find a document where he gave some oral reports, but no survey forms other than the ones mentioned at the top of the page here. (Emphasis added)

(Q) What did you want him to do concerning a map?

(A) My suggestion was that in order to facilitate his travel, when he left the office, it would have been a rather simple matter to have located these people on the maps. We have county maps that have roads on them, that have addresses on them, information is available as to where farmers live, and *had he located these small farmers on the map, and used that as he traveled, he could have done, I would say four to six surveys a day. There is no reason why he had started and put in a day's work, he could have done fifteen to twenty surveys per day.* (Emphasis added)

(Q) You mean by coordinating his visits?

(A) Yes, by coordinating his visits and spending his time in an area doing these surveys. I know. I have done it many times.

Shearon further testified that later Elliott came to him with some comments regarding the map and regarding how he had planned to do it. "We had a discussion concerning the fact as to why I had suggested the map, and I told him; and Mr. Elliott became very angry, and stormed out of the office; and when he did, 'I told him to go ahead and do it like he wanted to do it' . . . a few minutes later he came back with a, two maps, and asked if they would do. Anyway, I spent some time with him in looking at the maps and told him yes, that would be fine, he said that he would he could not locate the producers before he went, and that uh he wasn't able to, didn't know them well enough to know where they were. I said all right, take it with you as you go, and make a numbering on them, as you go, and locate them on the

map, so that when we get through, we will have information concerning where these producers live and that will get us even more information. He left my office, and put the maps on the bulletin board."

Employee introduced Exhibits #83 through 85 which were identified as feeder pig recertification cards for five different farmers. The cards were to certify to the Tennessee Department of Agriculture that the producer who signed the card was a feeder pig producer in Madison County and that he did not deal in swine and that he met requirements for Tennessee organized feeder pig sales. At the bottom of the card on the left was a blank space for signature with "extension leader or feeder pig committee chairman" typed in and underlined and a line on the right underneath which was typed "producer" for the producer to sign.

The evidence introduced showed that in the past, recertification cards had been signed routinely in the Madison County Office by either one of the three agricultural agents, Shearon, Butler or Elliott. Elliott further testified, and it was undenied that past custom had been for form letters to be sent out to all feeder pig producers relative to recertification for marketing cards and signed by all agricultural agents Curtis Shearon, Robert B. Elliott, John D. Butler, (Exhibit #102). A list of feeder pig producers was introduced showing the initials R or J, referring to Robert or Johnny as further evidence that this responsibility had been previously shared (Exhibit #102). It was undisputed that normally the cards were typed by an extension office secretary and a recertification fee of 15 dollars each was received by the secretary with each card signed by one of the extension agents and a card issued to each producer.

On November 21, 1981 Shearon wrote a handwritten letter to Downen (Exhibit #54), subject "re: job performance Mr. Robert B. Elliott" the letter provided as follows:

Since the July 24 "field day" and especially since the agricultural committee meeting of August 27, 1981, Mr. Elliott has had every opportunity to demonstrate that he could and would change and perform in an expected manner. *This performance should have been in keeping with duties set forth in his "job description" and according to instructions given by me, Dr. Turner and Mr. Luck.* This has not been the case.

A few examples are: On August 7, 1981 I initiated an office sign-out sheet and requested each agent to sign in then put down time-out, destination and expected return, each time they left the office. Mr. Elliott's use of this sheet has been very meager. In most cases there is no way to tell from the destination indicated where he could be found, if needed, also this sign-out sheet clearly shows that most of his time has been spent at activities other than working with low-income farmers.

I have made several attempts at getting him to perform. These have all been labeled as harassment. While on the other hand he has done everything possible to harass me and to some extent other agents in the office.

He visited with Mr. Luck on one occasion and Mr. Luck suggested that he start working with low-income farmers and provided him with some survey forms for use in collecting data. *To date he has not given me a completed form.* (Emphasis added).

Mr. Elliott filed an informal discrimination complaint with Dr. Gene Turner and as a result we met with Dr. Turner and discussed it on October 28, 1981. During the course of the discussion Mr. Elliott told Dr. Turner that he had found 20 completed "small farm surveys" that he had done in 1978 or '79, later in the day he gave me 15 survey forms, 13 of which were partially completed and 2 with only a name on them. I showed these to Dr. Turner and he suggested that I return them to Mr. Elliott with a suggestion that he complete them or bring them up-to-date and to proceed to do other surveys and other work with low-income farmers.

I returned them to him on November 13, 1981, along with a letter from Dr. John R. Ragan, State Veterinarian concerning "recertification of feeder pig producers for marking cards".

I had a long talk with him and told him how I expected him to start this task immediately. He had not provided me with the schedule nor had he shown me a map with the feeder producers located. If he had followed my instructions, he would have given me a report and turned in 20 - 30 completed surveys on Friday afternoon. I did not get the report. Mr. Elliott has not adequately responded to my assignments given.

This letter was dated nine days after Shearon's October 12, 1981 letter, supra. On November 23, 1981 Elliott wrote to Shearon as follows:

In reference to your letter dated 12 November, 1981 concerning the visits to the feeder producers and surveys:

I received the survey form from Mr. Luck. *I am getting a survey from each person I visit. I started visiting all feeder pig producers on the 16th of November, 1981.* Since November 16, I have also had calls which dealt with grubs in fairway at Woodland Hills. I carried Dr. Russ Patrick to Woodland Hills to check the damage at the request of Mr. Fox, the manager of Woodland Hills. My recommendation was to use 80% sevin and to use two applications in the area affected. Hopefully, the weather would get cooler and the grubs would go deeper in the soil. I also visited Mr. Jerry Smith on Moorewood Drive to give advice on creeping red fescue and Kentucky 31 fescue. My findings were: the grass was sown too shallow and the root system was not deep enough to sustain the plants. The grass was dying and in places where the grass was not dying it had a deeper root system. I checked pigs at Mr. Charlie Hill's farm and also obtained a low-income survey from him.

The 19th of November I visited Mr. Askew, Mr. Goodwin, Mr. Boone, Mr. Hicks, Mr. Johnson about their feeder pig program. Mr. Henry Yarbrough was visited in reference to use of commercial weed control on lawns. He had a professional lawn cutting system. Mr. Willie Boone indicated that he needed me to help him locate a boar for his herd. I will make this contact this week.

Mr. Hamilton and son was visited and his main concern was the number 3 grade pigs he has been receiving. I hope to keep a close check to try to detect what is causing the pigs to grade no. 3 instead of no. 2.

Monday, November 23 I visited Mr. Douglas Chandler, Mr. William Neely, Mr. Horace Reed, Mr. Ramond Allen, Mr. Issac Neely, Mr. Calvin Day and Mr.

Leroy Neely. Mr. Reed wants me to help him with a building. I suggested the Moton building. I plan to have a feeding demonstration with Mr. Issac Neely. His pigs were infested with lice and needed worming. I plan to get him out of the no. 4 grade to no. 3 and better. Also, Mr. Chandler can use a lot of help in improving the quality of pigs he is selling.

I had planned to go to Huntingdon to help with the feeder sale, but decided that since our producers will all be recertified by January 1, I will wait to see who we will have at this time.

I am using a system of marking the list with producers of the same community with the same number so that when I go to a certain part of the county, I will check with the one and next day might be the fives, etc.

If you need more information on my system, please let me know. (Emphasis added)

On November 24, 1981 Elliott sent a letter to feeder pig producers of Madison County, "subject: recertification for marking cards" (Exhibit #56). The letter was almost identical in information to letters which had customarily been sent to feeder pig producers about this time of year (Exhibit #102). The letter informed the feeder pig producers that certification for 1982 and a valid 1982 feeder pig marketing card would be required for any producer to sell pigs in an organized feeder pig sale on and after January 1, 1982. The letter further provided as follows:

We have set aside December 15, 16, 17, and 18, 1981 as the dates to issue new certification to Madison County producers. If you want to sell pigs at Brownsville, Huntingdon, Lexington, then you should come to the county extension office on one of these dates, or before you go to a sale, as your old certificate will

not be honored. Also, be prepared to pay your livestock association dues. They are \$15. Office will be closed for Christmas December 4 until January 4, 1982.

In addition to providing additional information to producers relative to standards, requirements of the State, etc. Elliott stated in the letter:

We hope to visit all producers sometime during the year, but, if you have problems and would like some help, please call us at 668-8543. We are located at 309 North Parkway, just off 45 Bypass.

Our winter meetings will be starting in January and we hope you will attend the ones that interest you. Enclosed is a program schedule for the meetings.

In reviewing the evidence of record the first reference to swine as a part of Elliott's assignment was in the April 28, 1980 minutes of the Madison County Extension Office conference (Exhibit #27) as follows:

Mr. Shearon assigned the agricultural part of the plans-swine section, Mr. Elliott . . . (Handwritten note on exhibit - "I finally had to complete this")

The discussion at this conference related to the annual report, plan of work and plan of work projection for the Madison County Office. It was later charged in this hearing as an example of failure to complete other assignments, that Elliott never completed this assignment and Shearon testified that he "finally had to complete it". Elliott denied that he failed to complete this assignment. The only earlier reference I find relating to swine was the March 10, 1980 minutes of the Madison County Extension Office conference (Exhibit #26) which related that Shearon had discussed a swine computer printout for

Madison County with Elliott and, asked him "to begin studying the printout and possibly be prepared to write the part of the plan related to swine". The actual assignment was made on April 28, 1980 (Exhibit #27, supra). Whether or not Elliott completed this swine portion of the plan, I cannot determine from the evidence. Employer's offer of proof thus was not sufficient to meet its burden of proving this charge. Furthermore, the assignment was made in April 1980 and the charge for failure to complete this assignment came well over a year later, long after the plan was due and apparently completed. No evidence was introduced to show that this was ever called to Elliott's attention, or that he otherwise was reprimanded during this period. Furthermore, Elliott received an official rating of average or above in all categories and an overall rating of 3.0 for that year. Therefore, the charge of failure to complete the swine portion of the Madison County plan of work cannot be sustained.

Further search of the record produces no substantial and material evidence to show that Elliott's assignment relative to feeder pig producers required him to take the recertification cards to the producers, see that each producer was recertified "on the farm" and collect the 15 dollar fee. I cannot presume to know what oral discussions took place between Shearon and Elliott relative to this matter. However, based on the evidence of record, I can only conclude that a person of reasonable mind who was familiar with the recertification process which had been followed in Madison County for the last several years would not interpret Shearon's instructions that it be done any differently in 1981, other than this year it was to be done by one agent rather than all. The instructions were clear in that Elliott was to "please make these producers part of your survey group", that Shearon suggested

that he locate feeder pig producers and other small farmers on a county map and work it community by community so as to make the best use of his time and travel allowance. I cannot conclude from that letter that recertification for the 1982 marketing year was to be completed "on the farm" or that it instructed Elliott clearly to visit all feeder pig producers by the end of December 1981. I do not question the intent of Shearon, but the letter must be interpreted within its four corners for the purposes of this hearing.

Elliott reported his activities to Shearon by letter supra, eleven days after the assignment was made on November 12th by Shearon. There is no indication on Shearon's November 12th letter that Downen, Luck or Turner was copied or that they were otherwise apprised or aware of the feeder pig assignment as related in that letter.

In Shearon's handwritten letter to Downen dated November 21, 1981, supra, Shearon referred to the feeder pig recertification and related that he had a long talk with Elliott and told him how "I expected him to start this task immediately". Shearon further related to Downen that Elliott "has not provided me with the schedule nor has he shown me a map with the feeder pig producers located. If he had followed my instructions, he would have given me a report and turned in twenty to thirty completed surveys on Friday afternoon. I did not get the report. Mr. Elliott has not adequately responded to assignments given." Recalling from Shearon's testimony, supra, he indicated that he and Elliott had some discussion about the use of maps, that, Elliott became angry and he told him to go ahead and do it like he wanted to. Shearon further testified that with proper coordination one could easily do fifteen to twenty surveys per day.

It was unclear whether or not this was in reference to recertification or to collect additional information for further use relative to the small farm group. Although the recertification issue was disposed of supra, by way of dicta I question the wisdom of abruptly changing the recertification procedure for Madison County producers at this particular time. I can, based on my own experience working as an extension specialist surmise how farmers who had been accustomed to following a set procedure would respond to this change under the circumstances. Also, the administrative wisdom in handling the recertification process in this manner which would involve the collection of the 15 dollar fee appears to be less than desirable. Furthermore, if the purpose of the surveys was to get additional "useful" information I seriously question the value of data collected visiting fifteen to twenty farmers in one day at various locations, even though they might be for the most part located in the same community. Four to six, however, appears reasonable.

As indicated, supra, Elliott reported his progress relative to the feeder pig producers and surveys to Shearon by letter November 23, 1981 with copies to District Supervisor Luck and others. Again, on November 30, 1981 by letter he reported his activities for the week of November 23 through November 27, 1981 to Shearon (Exhibit #59b). The letter began with "I visited feeder pig producers in an effort to visit all producers in the county", followed by a report of his activities for that week. Shearon testified that he was glad to get Elliott's report but that he was "disappointed" and that still there were no surveys indicating the benchmark data or indicating that "what else was concerned on these farms with regard to the farmers, except the fact that he said he made the

visits, but he does say in the letter that he has gotten the survey forms, and I was glad to note that he promises here, to start doing surveys on all the farms that he visits". The reference here was to Elliott's November 23rd letter.

Shearon further testified that Elliott's recertification letter (Exhibit #56), supra, violated his instructions to "visit the feeder pig producers". Again, while Shearon may have intended his instructions to specifically require on the farm certification, I cannot so conclude from his instructions (Exhibit 52, supra).

Shearon also testified that he received Elliott's November 30, 1981 letter on December 9, 1981 and that the first survey form that he received from Elliott was enclosed with the letter. The record is unclear whether the survey forms referred to related to feeder pig producers, farmers in the Cyprus Creek Watershed, or an all-inclusive category of small farms. In Shearon's letter to Downen, supra, dated November 21, 1981 he indicated that Elliott had visited with Mr. Luck on one occasion, that Mr. Luck had suggested that he start working with low-income farmers and provided him with some survey forms for collecting data. Shearon further indicated that as of that date he had not received a completed form from Elliott. Following that statement in that letter, however, he further related that during Elliott's visit with Dr. Turner on October 28, 1981 relative to a discrimination complaint that Elliott turned in some fifteen "small farm surveys" that he had found in his briefcase which had been done in '78 or '79 and that later in the day Elliott gave him fifteen survey forms. Shearon testified that they were not complete and that Dr. Turner suggested that he return them to Elliott with the "suggestion" that he complete them and bring them up-to-date and proceed

with other surveys. Shearon testified that he was again glad to get Elliott's November 30, 1981 report which "told of work that he was doing and visits he was making concerning various things". Shearon said, however, "this was not reports in the form that I had asked him to give except for the one survey form 'which was included with the letter' and the only one I received until sometime in mid January". There was no evidence offered to show that Shearon officially responded to Elliott's letters either with further instructions, reprimand or in any manner.

Shearon's letter to Elliott dated December 9, 1981, Exhibit 59a, referred to in part, supra, reads in full as follows:

I am writing in regard to your November 24, 1981 letter to feeder pig producers concerning recertification. As you recall, I wrote you on November 12, 1981 giving you a specific assignment on surveying small farmers throughout Madison County. As part of this assignment I specifically asked you to make the recertification of feeder pig producers as part of your survey group.

I am disappointed that you responded to my assignment by sending a form letter to all producers requiring them to come by the office for the recertification visit. I specifically wanted you to go and visit these producers. As you know, this was part of the assignment that I gave you along with visiting small farmers, which was the only assignment that I gave you to do until the end of the year. You should have checked with me prior to sending your letter to feeder pig producers. It is now too late to rescind this letter because probably not enough days remain in the year, due to the holidays, to visit all of these pig producers. In

my judgement your decision to use this method of recertification was directly in violation of my specific instructions to you and amounts to inadequate performance of this assignment. Had you carried out my instructions you could have completed recertification visits and surveys of all feeder pig producers as well as many other small farmer surveys before the year's end.

Immediately upon receipt of this letter I am instructing you to bring to me all completed survey forms from feeder pig producers and other small farms.

Mr. Elliott, you also know that I am not piling the assignments on you. I have given you one assignment to complete in six weeks. It is your job to carry out this assignment in a satisfactory manner, in accordance with my instructions. *By copy of this letter I am advising Dr. M. Lloyd Downen, Dean of the Agricultural Extension Service, that I consider your overall job performance to be inadequate for this calendar year.* (Emphasis added)

I cannot presume to know from the evidence what Shearon conveyed to Elliott orally, or whether or not Elliott understood the assignments to be specific as Shearon testified they were and which Elliott denied. I can conclude from the foregoing letters back and forth from Shearon to Elliott and Elliott to Shearon and testimony relating thereto that Shearon's instructions to Elliott in my mind, were not as clear as they could have been and should have been under the circumstances. Elliott's responses indicated that he was alleging at least that he was trying in his best efforts to make a proper response to the instructions given to him by Shearon although it is clear that he had not completed four to six surveys per day.

I cannot presume to know what conversations took place between Shearon and Elliott. I do feel however, there should have been some documentary response. In fact, UTIA disciplinary policy, Exhibit #127, supra, dictates that where employee is being charged with improper behavior or inadequate performance that "the supervisor shall first notify the employee orally . . . the employee, should be told what corrective actions are necessary and when the corrective actions are expected", followed by documentation in the employee's personnel file. It is further provided that:

If the unsatisfactory performance or unacceptable behavior does not improve, the supervisor should issue a written warning to the employee. This written warning should detail the inadequate or unacceptable performance, state the corrective actions required and the time period in which corrective actions must occur, and state the action(s) to be taken if corrective actions are not accomplished. (Emphasis added)

It is clear from the records throughout this hearing that Elliott failed to complete a substantial number of surveys whether related to the small farmers as a group, Cyprus Creek Watershed farmers, or feeder pig producers. It is not clear, however, that the assignments relating thereto were clearly outlined and specific, nor was there any response of record either by Shearon, Turner or Luck to Elliott's activity reports relating to his efforts to follow Shearon's instructions as outlined in his November 12, 1981 letter relative to feeder pigs, supra. It appears that propriety would have logically dictated a supervisory decision at the district or state level or at least for Turner, Shearon and Elliott to come together to discuss the situation existing in Madison County Office, and for Shearon and Turner to outline specific assignments that were clear

which would defy misunderstanding. The evidence is inconclusive as to specifically what efforts were made on the part of Shearon and Turner to correct the alleged problems or to what extension Elliott cooperated with them in an effort to understand what was expected of him. However, if I could conclude from the evidence, which I cannot that the instructions were specifically clear I could not find that employer followed its own prescribed disciplinary procedure. I therefore conclude that the charge of insubordination and/or failure of employee to perform his assignments relative to feeder pigs is not sustained.

On December 9, 1981 Elliott responded (Exhibit #60) to Shearon's letter of December 9, 1981 as follows:

I am writing to you in regard to your November 24, 1981 letter, in which you say you consider my overall job performance to be inadequate for this calendar year. (NOTE: It was determined that the reference to November 24, 1981 was a mistake and Elliott's response was in fact to Shearon's December 9, 1981 letter)

Mr. Shearon, will you please cite dates, times and also specific assignments that I have failed to perform adequately in the past five years, or since you have been on the staff in Madison County. I would like this in writing so that I can look at areas that I am deficient in and try to correct any deficiency that I may have.

Mr. Shearon, I want to work in complete harmony with you so as to give the taxpayers in Madison County maximum output from this department. I extend the hand of cooperation and I hope you will accept this gesture so that both of us can be effective in serving the needs of the people of this county.

Mr. Shearon, *I do not feel that I have had proper assistance from you since our meeting where the committee voted to dismiss me. You are aware that I have worked for eighteen years, including military, and my job performance has always been above average until you came. However, nothing was ever said about my job performance until the two incidents last summer which were loaded with racial overtones. Do you not condemn the referral of my race of people as "niggers" in public, and for my race of people to be referred to as "black thieves"?*

Please, Mr. Shearon, I will cooperate any way that I can if you will cite specifics. (Emphasis added).

Shearon testified that he was glad to get Elliott's December 9 letter and "to see the change in tone with regard to Mr. Elliott's condition toward me", but that he could not accept the fact in any way that he had treated Elliott unfairly by not giving him proper assistance in that "I had certainly given him specific dates and assignments and times and things to do, that were not only orally done over a period of five years, but also in more recent months, had been put in writing, and still Mr. Elliott writes and says that he cannot understand and that he is willing and ready to go and do these things, it strikes of the fact that Mr. Elliott is still not performing and that he is indicating something that I failed to believe is true, that he does not have the ability to understand instructions and to carry them out. It seems to me that Mr. Elliott is saying that he does not intend to follow my instructions."

It appears that at that point the relationship between Shearon and Elliott had deteriorated to such an extent that communications between them was very difficult if not impossible; all the more reason as stated, supra, that propriety calls for supervisory assistance from a higher

level under such circumstances. Again, I cannot presume to know or understand what took place, outside the parameters of the official record of this hearing within which I must confine my findings and conclusions. I can conclude however, from the record that there was an obvious lack of communications between employee and his supervisors and between supervisors as well. This will be addressed further, infra.

The findings and conclusions relating to the specific charges dealt with, supra, notwithstanding, the overriding question of whether or not the UTAES followed its own officially sanctioned disciplinary procedure relating to charges of insubordination and unsatisfactory performance against Elliott and whether or not it is bound by its own performance evaluation system must be considered and related thereto.

According to University of Tennessee Personnel Policy and Procedures, Sec. 160 Po2, supra, "terminations will strictly adhere to University policies and procedures". Therefore, as indicated, an overriding issue which relates to the entire hearing proceedings, is whether or not employer followed its own policy and procedures in its disciplinary actions against Robert B. Elliott. It is understood by this hearing examiner that it is the responsibility of the AES under the direction of its dean, to determine what performance and behavior is adequate or proper for an agricultural extension agent, "within established standards". Furthermore, it is not my responsibility herein as administrative law judge and hearing examiner to substitute my opinion for that of Elliott's supervisors as to what standards of performance or behavior are acceptable for a county extension agent. It is, however, my responsibility to determine from a preponderance of evidence whether a clearly established system of discipline

and evaluation system was followed. Moreover, it is my responsibility to make a determination as to whether or not the various assignments were sufficiently clear that a person of "reasonable mind" would understand them, and then whether or not there was a failure to perform those assignments.

On February 13, 1980 Shearon evaluated Elliott's performance for 1979 and testified that he met with Elliott orally to explain Elliott's deficiencies and made notes on their discussion (Exhibits #23, 24, supra). Elliott repeatedly denied having the opportunity of discussing his recommended ratings with Shearon. The rating Shearon recommended to his supervisors for Elliott for that year was an overall 3.1. The final official rating for the year July 1, 1979 through June 30, 1980, signed by District Supervisor Luck was 3.0 overall. Shearon's handwritten notes on the conference indicated Shearon had discussed with Elliott his performance, including his strengths and areas which needed improvement. A lack of planning and documenting his work and reporting on his work were emphasized. Again, Elliott claimed that Shearon's ratings and his notes were forgeries created after-the-fact to incriminate him. I find no evidence to support that assertion. Employer on the other hand claims that Shearon gave an oral warning to Elliott on February 13, 1980 . . . if such a warning in fact occurred, it was not documented in Elliott's personnel file. Employer claimed that there is no mandatory requirement that oral warnings be documented, that the policy states that such warning "should" be documented in the employee's personnel file, and that in the light of all the circumstances surrounding the evaluation conference of that date the requirements of the first step of progressive discipline were completed. That claim is not well founded for sev-

eral reasons. First, "an oral warning that performance must improve" conflicts with Shearon's own recommended rating of 3.1 and Elliott's final official rating for that year of 3.0 by Luck. Secondly, the purpose of the management by objective (MBO) rating system is to provide a supervisor-supervisee conference to discuss the strengths and weaknesses of employee's performance with the objective of discussing ways of improvement where needed as reflected in the rating. A rating of 3.1 recommended by Shearon and an overall official rating of 3.0 by Luck, which is satisfactory, supports the idea that this is precisely the type of conference provided for by the MBO system. Thirdly, if an oral warning is given to an employee, the progressive discipline system requires that employee not only be notified of improper behavior or inadequate work performance, but "employee should be told what corrective actions are necessary and when the corrective actions are expected. Furthermore, "the date and nature of the oral warning should be documented in the employee's personnel file". Although personnel policy states oral warnings "should be documented" and it might be interpreted as not required under said policy, it seems very clear that the very purpose of documented oral warnings are to insure that such warnings are in fact given and employees put on notice that improvement must be forthcoming or be subject to further disciplinary action. The purpose of "progressive discipline" is to through a series of progressive steps give an employee every opportunity to correct any job-related problem. The evidence does not support such a finding that the UTIA progressive discipline policy was followed with Elliott relative to his job performance.

I agree that the evidence presented at this hearing supports the idea that Elliott has done a lot of good work

in Madison County as testified to by his supervisors and further supported by his own numerous witnesses. However, I further agree he did not complete some assignments which were clear and that the evidence, including testimony of his own witnesses tends to support the idea that he had a tendency to focus his efforts, and especially in recent years on various subjects away from his primary assignment of working with small farm families. Moreover, a preponderance of all the evidence leads me to believe that Shearon did in fact, as Elliott's immediate supervisor, in good faith attempt to motivate and assist Elliott in improving his performance up through the fiscal year ending June 30, 1981. After that time, however, there was an apparent breakdown of communications between the two. I further believe that Shearon, as he testified was "frustrated and disappointed" in his efforts both by Elliott's lack of response and in not being able to effectively communicate to his supervisors that problems were developing which required their assistance. There was an obvious lack of communications between Shearon and his supervisors as reflected in Shearon's ratings of Elliott and in Elliott's official ratings during those years (Exhibits #18, 19, 20 and col. Exhibit 64, supra). This was further reflected in Shearon's letter to Luck dated September 26, 1981 (Exhibit #43, supra) "re: Robert Elliott:, as follows:

I have not waited until now to complain about Elliott's job performance.

I went to Mr. Short in the summer of 1976, and we caught him playing golf during working hours and he was not on leave.

I have from time to time, and sometimes I thought I was doing it too often (discuss with you and Dr.

Turner numerous problems regarding his work or should I say failure to work). As I told Mr. Boone on August 27, 1981, it is my feeling that these problems should be resolved through the chain of command, that is through supervisors rather than the committee.

Some of these things I think you and/or Dr. Turner will recall my discussing are:

1. Poor job performance
2. A habit of skipping in-service training
3. Lack of planning
4. Poor reporting habits (TEMIS and others)
5. His hurting office morale, especially 4-H and Home Ec. agents getting by with so little work.
 - a. No planned programs
 - b. No night or weekend work
 - c. Not being in the county when they were required to live here
 - d. Rumors of his doing cabinet work while on UT duty
6. His failure to do the small farm surveys
7. Has not taken over the feeder pig work

You will also recall that I discussed with you and Dr. Downen the possibility of changing the job description of he and Mr. Butler to give them each some 4-H responsibility. I did this when Tommy Patterson left, with the idea of giving a new ag agent some adult as well as 4-H exposure. My idea was to help even out the heavy work load that seems to fall on 4-H agents.

There seems to be some question about changing the job description; *therefore, I dropped the idea because it had no chance of working without administrative backing.*

Also, let me remind you that his actions and lack of performance have been a concern of the committee in the past. Mr. Donnell brought this up with him in the committee meeting on October 16, 1979.

Mr. Boone also charged that I am putting too much paper work on him. I can't think of any paper work he has been given that has not been given to other staff members. As you know, most of it comes to us through the chain of command. The case is—he will simply not do it, or not do it correctly. (Emphasis added)

On July 6, 1981 Elliott acknowledged in writing that he had been advised that his MBO rating for the time period of July 1, 1980 through June 30, 1981 was 3.0 (Col. Exhibit #64, *supra*). A handwritten notation on the acknowledgement "I am not pleased with a 3.0 rating" indicated Elliott's dissatisfaction with the rating. He testified that he was never given the opportunity to discuss this rating with District Supervisor Luck.

Heavy emphasis was placed by Elliott's supervisors at all levels throughout this hearing on "professional responsibility". I agree, as stated, *supra*, that a county agricultural extension agent is a "professional" and is expected to exercise professional discretion in self-supervision in his daily activities. However, I cannot agree that this means that an agent, once hired should be allowed to "do his own thing" and "fail to do his job" for years without an official reprimand if necessary or otherwise some "clear and specific" instructions for im-

proving a problem situation if it, in fact, existed. Employer's claim that they were very lenient with employee and gave him every opportunity to improve his performance" is not sufficient. Wherein lies the professional responsibility to exercise supervisory authority? It appears that although Shearon on several occasions may have raised the question of Elliott's performance with his supervisors prior to the MCAEC committee meeting August 27, 1981 and that he may have made good faith efforts to "motivate and assist Elliott in improving his performance", I can find no good reason for an agent, under the circumstances, to have been greatly concerned or apprehensive about being subject to discipline relative to his performance and certainly not termination of employment when he received no official reprimand and received satisfactory performance ratings. Accordingly, I can find no legal justification to sustain employer's charge of insubordination and/or improper performance prior to the end of the 1981 fiscal year. Furthermore, as the trier of fact, I find that neither Luck, Turner or Shearon made an effort to explain to the MCAEC committee the disparity in Shearon's report on Elliott's performance and his MBO ratings as signed by Luck and officially sanctioned administratively, at the committee meetings on August 17 and August 27, 1981. Luck was not called during the hearing to explain the ratings or in support of Shearon, nor did Turner or Downen satisfactorily explain the disparity during the hearing.

It was claimed by employer that from October 21, 1981, after Downen's investigation was concluded, through December 18, 1981 the day that Downen proposed that Elliott's employment be terminated, it was necessary for Elliott, in order to insure the security of his job, to carry out Shearon's instructions and that had he done so the

disciplinary period, which it claimed began August 5, 1981 and Downen's subsequent written warning on November 5, 1981 (Exhibits #108 and 117A, supra), would have ended successfully and any threat of termination would have been avoided. It was concluded by this hearing examiner, supra, that Downen's August 5, 1981 warning was premature, but that he was justified in the November 5, 1981 warning following his investigation of the Madison County livestock field day incident. It should be noted that this warning "... I am warning you again that verbally abusive outbursts are improper job behavior and will not be tolerated and is the type of job behavior which can lead to further disciplinary action" related to job behavior and not performance and also implies an opportunity for employee to correct his behavior. In its offer of proof employer failed to show that employee had ever been officially reprimanded or disciplined for inadequate performance until after Downen's instructions to Shearon following his investigation trip to Jackson October 20, 1981, that "in keeping with UTIA disciplinary policy all matters pertaining to Elliott should be documented". Both Shearon and Downen testified that Shearon was so instructed. Then followed the series of letters from Shearon to Downen, the exchange of letters between Shearon and Elliott and ultimately Downen's letter of December 18, 1981 some six weeks after his November 5, 1981 letter to Elliott proposing that his employment with the AES be terminated, all discussed, supra.

It is clear that Elliott did not make a concentrated effort to complete any substantial number of small farm surveys at any time up to and including during the time of this hearing. It is also clear however, that Shearon's instructions to him during this period were not unmistakably clear as they should have been at all times and

more specifically under the circumstances, but in fact in my opinion, at times were confusing and in conflict with previous instructions. Whether or not Elliott deliberately and purposely misunderstood Shearon's assignments or whether or not Shearon deliberately and purposely made them difficult to follow I cannot say. The evidence on the other hand is clear that Elliott did in his letters to Shearon, supra, indicate that he was making an attempt to follow instructions, that he did not fully understand what was expected of him, and at least on paper indicated that he would follow Shearon's instructions, "if you will tell me what I am doing wrong and tell me what you want". Shearon testified that he continued to be "disappointed and frustrated" at this point; all the more reason for Shearon's supervisors to step in and assist Shearon in outlining specific, unquestionably clear instructions for Elliott. I cannot find within this record that this was ever done.

On June 25, 1982 Elliott was notified by District Supervisor Luck that his current MBO rating for the fiscal year ending June 20, 1982 was 1.0 (Exhibit #144). UTIA AES procedure following an unsatisfactory MBO rating of an average score below 1.5 which clearly indicates failure to meet minimum standards, "requires re-examination of job assignment and/or formal plan of action for considerable improvement". I find it difficult to reconcile the fact that Luck was not called, as Elliott's district supervisor, who is responsible for officially rating him, to speak either for or against him during this hearing. According to employer's own proof, Luck's role in evaluating Elliott's performance was minimized. Yet Exhibit #144 which shows a rating of 1.0 implies that employer claims Luck can now objectively determine that Elliott's performance was substandard during this period. With this,

I cannot agree; it defies common reasoning that under the circumstances that either Luck or Shearon could have objectively determined an MBO rating for Elliott for the 1981-82 fiscal year.

Considering all the foregoing evidence I conclude that the UTAES, the claimant in this hearing has not satisfactorily met its burden of proof to show that Robert B. Elliott has not satisfactorily performed the work required of him as an agricultural extension agent with agricultural program responsibilities in Madison County. Furthermore, if he has been insubordinate, it was consistently and continuously overlooked, thereby, in my opinion employer effectively failed in its burden of proof on the charge of insubordination.

In further support of its general charge that employee failed to carry out instructions given to him by his supervisors, employer offered proof that employee failed to keep proper mileage record books and turn them in promptly, that he failed to use his talents in writing news articles for the Jackson Journal, that he failed to complete an assignment in conducting a 4-H crop judging session for the 1981 fair to be held in September of that year, and that he failed to write the swine portion of an annual plan of work. (Exhibits #35, 36, 37, 41, 44 and col. Exhibit 33)

Downen testified that a request was made of Madison County agents to provide their mileage records for the month of June, 1981, which was prompted by an audit of an unrelated program, the expanded food and nutrition educational program (EFNEP) whereby the AES was required to provide mileage books in sample counties that the federal auditors visited. On cross-examination Downen admitted that the EFNEP audit was unrelated

to small farm program and that Madison County was selected in the First District for examination of mileage books by him, "that was a happenstance", and that Madison County was the only county in District One where mileage books were requested. Downen testified that he requested of all district supervisors that they provide him with the mileage books for all of the agents in certain counties and one per district, but that there was no written communication requesting the mileage books of agents in Madison County. He testified that he made this request in a staff meeting with supervisors in Nashville on June 3, 1981. Downen had asked the supervisors to get the books for one month, June 1981, but it is unclear how this was conveyed to Elliott. On July 30, 1981 Shearon wrote to Elliott (Exhibit #36) as follows:

Since you have not produced a single mileage record for the period of July, 1980 through June 1981 I would like to have every mileage book for the period July, 1978 through June, 1980. Please put them on my desk before going home this afternoon.

There was nothing in Exhibits #35, 36, or 44, or otherwise admitted in evidence to show any written or oral requests from Downen for anything other than one month, that is for June 1981. However, assuming Shearon requested the mileage books from Elliott for the month of June sometime after Downen's June 3, 1981 meeting with supervisors, Shearon's letter of July 30, 1981, supra, indicates that sometime prior to that time he had requested mileage records for the period July, 1980 through June, 1981 and in that letter he instructed Elliott to turn in mileage books for the period July 1978 through June 1980. Further review of Downen's testimony shows that he received mileage books for the month of June from

other agents in July and August. Downen further testified relative to the mileage book request as follows:

- (Q) Do you have any idea why he (Shearon) would have asked him (Elliott) to produce them a full year . . . when you had only requested them for one month of the other employees?
- (A) Yes sir. I know why.
- (Q) Why?
- (A) Because the only agent who did not have June 1981 in the five districts was Mr. Elliott and I asked that Mr. Elliott produce them for three years, as I indicated the other day. I don't remember which day. I wanted to be sure that there was not a possibility that Mr. Elliott had misplaced the one month. I was anxious that Mr. Elliott was complying with the policy of keeping the mileage record book.
- (Q) That answers the question of why he asked for Mr. Elliott's mileage for the period July 1978 through June 1980 but it does not answer the question of why he would ask him to produce the records from July 1980 through June 1981, when you had only asked for one month?
- (A) Senator, I don't understand.
- (Q) Well, I understood your testimony, you said you asked in the counties affected that the agents with travel allowances, produce their mileage record books for the month of June 1981 because you wanted to use them in case of an audit and you wanted to check on it. Now, I remember that correctly now, am I not?
- (A) I did not say that I wanted to use them in case of an audit.

- (Q) Oh? You asked for June 1981, is that correct?
- (A) That's correct.
- (Q) Do you have any explanation as to why he should come back and ask Mr. Elliott for a full year from June, 1980 through June 1981?
- (A) He's asking—for three years now.
- (Q) You are right—
- (A) Yes sir in response to my, I assume in response to my request.
- (Q) All right, now then, it is apparent from this letter, Exhibit #36, if Mr. Shearon is telling the truth that he had asked Mr. Elliott, and indeed from his testimony, that he had asked Mr. Elliott for a full year before you got to that three-year demand. Isn't that correct, in this letter?
- (A) This is correct and certainly Mr. Shearon as county extension leader had the right to ask for that if he wishes.
- (Q) Do you have any idea why Mr. Elliott was the only one he asked to give that full year?
- (A) I don't know what prompted Mr. Shearon to ask him for a full year but I do know that the other agents had supplied the June 1981 booklet, record books.

It is unclear whether or not Downen's request for the three years was made before Shearon's July 30 letter or afterwards. It is clear, however, from Shearon's letter that he had requested mileage for one year prior to that time. Downen further verified again on cross-examination that he did not receive all the books requested of other agents until sometime in August. Although there was no written

documentation prior to July 30, 1981 it can be presumed that if the initial request was made for one month as Downen requested, then the request was changed to one year prior to the time when Downen received all of the other books requested from other agents in August. Downen testified that he did not make any investigation to determine exactly when the first request was made by Shearon, but said that "the most significant part of the whole matter is the fact that Mr. Elliott was not maintaining his record books".

The evidence is clear that Elliott did not turn in the mileage books as requested. However, it is unnecessary for me to weigh this against the clarity and propriety of the request as might be perceived by a man of "reasonable mind" because it must be presumed that Elliott as an employee of the AES was reimbursed for his official mileage for that period of time. Since official travel by agents for which they are reimbursed must be approved by their supervisors, it must be presumed that Elliott's records were maintained and submitted in an "acceptable" manner. Furthermore, Elliott's official MBO rating that was signed by Luck and officially sanctioned by Hinton and Downen was 3.0 for that fiscal year ending June 30, 1981, indicating performance above acceptable standards. (Col. Exhibit #64, supra). Therefore, this charge cannot be sustained.

Employer also introduced evidence that employee began a series of news articles in the spring of 1980 in the Jackson Journal, that he continued to write for a period of time but abruptly quit. Shearon testified that he was disappointed but admitted that writing articles for the paper was voluntary. This was corroborated by additional testimony from Butler and Elliott and therefore, cannot be sustained as a charge of failure to complete assignments or otherwise in violation of work rule #25.

The charge relating to the swine plan of work was addressed, supra.

In further support of the general charge of failure to complete assignments, Elliott was charged with failure to perform training of a 4-H crop judging team for the September 1981 fair. Elliott testified that he requested tryouts and received responses from only three white youths. He further claimed that a Mrs. Neal Smith, mother of a fourth white boy interested in the crop judging event went directly to Mr. Shearon requesting that he hold the workouts, bypassing him. Elliott alleged this was done because of racial prejudice. Shearon testified that he received such a request from Mrs. Smith and did in fact conduct workouts, but only because Elliott had failed to do so. I cannot presume to know Mrs. Smith's reason for going directly to Shearon, or whether or not there was insufficient response to Elliott's request for tryouts. Considering the time, September 1981, and the circumstances existing at that time, I could draw an inference as to why Shearon held the tryouts and why Elliott did not, but it would be speculative. Therefore, I can only conclude that the proof is inconclusive on this charge.

February 25, 1980 minutes of the Madison County Extension Office conference were introduced as Exhibit #25 with reference to a specific paragraph which was underlined with a marginal note "never done". The paragraph reads as follows:

Mr. Robert Elliott discussed with Mr. Goulder the possibility of starting a woodwork project group for junior high and senior 4-H'ers only. Mr. Goulder was pleased with the suggestion and offered to get a group together for the group.

Shearon testified in direct examination that at the time this was merely a report and his notation "never done" in the margin reflected "to my recollection that fact that sometime later in discussing this with Mr. Goulder, pointed out to myself that they were never able to, to get the projects off. I do not know exactly why they were not, but, but that project was never done". In cross-examination Shearon testified that "these were underlined by me after I was requested to get some information concerning Mr. Elliott's performance". This was in reference to Downen's instructions to Shearon after his investigation on October 20, 1981. In explaining the marginal notation Shearon said "I was merely pointing out the fact that Mr. Elliott was habitual in agreeing to do some of these things and then that he would seem to never find time or never get around to working out a work plan and getting started and completing projects that were discussed." Shearon admitted on cross-examination that he had never called Elliott in and asked him if the project was ever done. On further examination Shearon could not say with certainty whether in fact the project had ever been done. It was also undenied that Mr. Goulder was the 4-H agent with 4-H responsibilities and therefore responsible for 4-H projects. Furthermore, it appears from the evidence that Elliott's offer of assistance to help Mr. Goulder in the 4-H woodworking project was voluntary and finally employer was unable to effectively show that the project in fact was not completed. Therefore, I find no support here for the charge of failure to complete "other assignments" in support of the broader charge of failure to carry out instructions given employee by his supervisors or violation of UTIA work rule #25.

10. *The Charge of Violating UTIA Work Rule #13, Use of Abusive Language, in that the Employee Directed Profane Expletives at the Shop Foreman of Murray Truck Lines on June 18, 1981, Verbally Threatened the Owner of Murray Truck Lines on June 18, 1981, and Directed Profane Expletives at Mr. Tommy Coley During the Madison County Livestock Field Day on July 24, 1981*

Employer failed to meet its burden of proving the charge of improper behavior by employee at the Murray Truck Lines, supra. Korwin, the shop foreman, was not called to testify at this hearing. Only Murray was called and no evidence was introduced to show that Elliott used profanity at the Murray Truck Lines. Since the burden of proof was on employer and Elliott's comments to Murray were, I'll see you down the road or something to that effect, on which Murray and Elliott's testimony disagreed, I cannot find this sufficient to support a charge of violating work rule #13.

It was clear however, as shown supra, under the charge of improper behavior at the Madison County livestock field day on July 24, 1981 that Elliott did direct profane expletives at Tommy Coley during that field day. The words used by Elliott, as supported by the evidence in this hearing were "wait a goddam minute, wait a goddam minute, wait a goddam minute", in response to what he heard as the word "nigger" used by Coley in referring to a black 4-H member. Three people, Mr. Boone, Dr. Neel and employee testified that Coley used the word "nigger". It was also undenied that Elliott was already angry at the time of the incident because he felt that Shearon had purposely overlooked Mr. Boone, a black farmer to be interviewed relative to his RAL-GRO experiment, supra. It was undenied that other extension agents have used profanity while

working with or among extension service clientele without reprimand. This is not condoned by this hearing examiner nor should it be condoned by the AES, nor is the word "nigger" used to refer to members of the black race condoned. However, taken in the context of UTIA work rule #13 "horseplay, disorderly conduct, or use of abusive language", and taken in the context of the situation and circumstances under which the profanity was used I cannot but find that employee violated UTIA work rule #13 at the Madison County livestock field day on July 24, 1981 keeping in mind "... the nature of the offense, the past record of the offending employee, and the penalties appropriate to the offense".

In Downen's letter to Elliott dated November 5, 1981, Exhibit #112A, supra, Downen informed Elliott that he had completed his investigation of the Coley incident, that he considered the language used in addressing Coley was in his opinion the type of abusive language which is prohibited by the University work rules and "accordingly, I am warning you again that verbally abusive outbursts are improper job behavior and will not be tolerated and is the type of job behavior which can lead to further disciplinary action". As stated supra, I agree that Downen's disciplinary procedure was appropriate here, which included a warning and implied that the disciplinary process would attempt to correct the problem in accordance with UTIA disciplinary procedure, and if not corrected could lead to further disciplinary action.

SUMMARY OF FINDINGS AND CONCLUSIONS

Inadequate and/or Improper Job Behavior

1. It was found that Elliott played golf during working hours on July 31, 1981 at 4:00 p.m. That standing alone would not require disciplinary action, but viewed

in the light of UTIA policy, the undisputed testimony of both Shearon and Elliott that Elliott had been warned of complaints against golf during working hours and had been relieved of professional duties of assisting golf courses, this was not in accord with propriety and does amount to improper and/or inadequate employee behavior. This finding is considered herein, keeping in mind the "... nature of the offense, the past record of employee, and the penalties appropriate to the offense".

2. Employer voluntarily waived its right to examine employee relative to the charge of conducting a commercial cabinet business during working hours, choosing not to go forth with its proof, thereby failing in its burden of proving the charge.

3. After listening to the evidence presented by both parties, due to the nature and circumstances of the charge of making, or allowing to be made, harassing telephone calls to the home of Jack Barnett, it was concluded that it would be in the best interest of justice to leave final disposition of this charge with the criminal court of Madison County and the Tennessee criminal court system.

4. It was concluded that employee did enter upon the premises of Murray Truck Lines on July 18, 1981 and that he was on duty at the time. It was further concluded that Downen's oral warning of August 5, 1981 to Elliott that his behavior was improper based on shop foreman Korwin's letter of complaint and that Downen's letter affirming the oral warning which was placed in Elliott's personnel file, were premature under the circumstances. Furthermore, in reviewing the entire evidence of record, it was concluded that employer, the claimant in this hearing, failed to meet its burden of proof on the charge of improper behavior at the Murray Truck Lines on July 18, 1981.

5. Relative to the charge of improper job behavior at the Madison County field day on July 24, 1981 it was first concluded that while Tommy Coley may have pronounced the word negro as "nigra" with no intended offense to the black race, three other people, Neel, Boone and Elliott heard the pronunciation as "nigger" and it was so concluded. It was further concluded that Downen's November 5, 1981 letter relative to improper behavior at the field day was appropriate under the circumstances in that employee's profane response to what he perceived as racially discriminatory speech and his subsequent false accusations against Coley were unjustified and not protected freedom of speech under the constitution, and evidenced traits undesirable in an AES employee.

6. Considered in the light of the professional responsibilities of an extension agent in serving AES clientele and overall AES policy and custom related thereto it was concluded that employer offered insufficient proof to meet its burden in proving that Elliott repeatedly left his work station or work area or that he otherwise was in violation of work rule #4.

7. While it was undisputed that policy relating to the use of the office telephone by Madison County extension employees was rather loosely enforced, the fact is undisputed that a number of personal long distance calls were made by employee from the Madison County AES phone and whether or not they were ultimately paid for by employee, was in violation of work rule #22.

8. It was found that employee's actions on July 24, 1981 at the Madison County livestock field day, taken in the context of UTIA work rule #13 "horseplay, disorderly conduct, or use of abusive language" and considering the circumstances under which the profanity was used, was in violation of UTIA work rule #13 and Downen's

November 5, 1981 warning relating thereto was appropriate. (Listed as Charge No. 10 by employer, supra)

Violation of UTIA Work Rule #25, Insubordination or Refusal to Follow Instructions or to Perform Designated Work and/or Inadequate Work Performance

Employer's proof relative to this charge was primarily focused toward an effort to show employee's failure to complete his assignments in the small farm family program and more specifically "the small farm survey assignment". Other assignments relating to this charge discussed separately, supra, are not herein summarized separately but overall in terms of performance and the issues relating thereto.

The evidence, in my opinion, is clear that the small farm survey program was never satisfactorily completed. It was also found that clearly Downen, Turner and Shearon considered the survey important to help Elliott effectively plan and upgrade his educational program with his small farm clientele. While in the beginning the survey assignments appeared to be reasonably specific and clear, during the latter part of 1981 there appeared to be a serious breakdown of communications between Shearon and Elliott.

It was found that Elliott's supervisors including Shearon, Turner and Downen all considered Elliott not only capable of doing excellent work but agreed that he has in fact accomplished much good work over the years. As stated herein, supra, Downen testified that Elliott's work up through June 30, 1981 was average for agents who had been with the AES for some fifteen years.

Supervisor Turner testified that he held Elliott responsible for the failure to do the small farm surveys and that he expected him as a "professional" to do the assign-

ment. The evidence is clear however, that neither Turner nor Shearon took any affirmative disciplinary action against Elliott for failure to complete the surveys. Both Turner and Shearon claimed they had a continuing expectation that Elliott would eventually complete the assignment and that they gave him every reasonable opportunity to do so. It was undenied that employee was given numerous opportunities to complete the assignment and that as claimed by employer "treated with leniency by his supervisors". However, the claim by employer that completion of those surveys was of "critical importance" was in my opinion, negated by failure on the part of employee's supervisors to formally reprimand him. This was further substantiated by his satisfactory MBO ratings up through June 30, 1981.

In summary, it was found that while Elliott did a lot of good work during the period 1976 through June 30, 1981, he also failed to complete some specific assignments which were clearly conveyed to him. However, it was also found that he was not officially reprimanded or disciplined, but to the contrary received *satisfactory* MBO ratings that satisfactorily met AES prescribed standards during that period. Therefore, the charge of violating work rule #25, insubordination or refusal to follow instructions or perform designated work and/or inadequate work performance cannot be sustained. It was further concluded that employer failed in its burden of proving employee violated work rule #25 or that his work performance was unsatisfactory after June 30, 1981 up to and including the time of this hearing.

RACIAL DISCRIMINATION AS A DEFENSE TO THE CHARGES OF IMPROPER AND/OR INADEQUATE JOB BEHAVIOR AND INADEQUATE WORK PERFORMANCE

As stated, *supra*, it was not my charge as trier of fact to consider issues in this hearing other than those that directly relate to employee behavior and performance. In the opinion of this hearing examiner, this contested case hearing was not the proper forum to try issues unrelated to the proposed termination of Elliott. However, while I had no jurisdiction in this proceeding to try a civil rights case on the merits, employee was given the opportunity to submit evidence in an effort to prove racial discrimination as an affirmative defense. Otherwise, if a proper forum exists, it exists in the federal court in which Elliott has filed his federal lawsuit against the UTAES, *supra*.

In this administrative hearing the UTAES had the burden of proving by a preponderance of the evidence any and/or all charges against employee relating to job behavior and performance. Since this is not a civil rights case under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Sec. 2000e. et seq., nor under 42 U.S.C. discrimination, employee must prove by a preponderance of Sec. 1953, in order to successfully defend charges of race the evidence that the disciplinary actions taken against him were because of his race, and that his supervisors only used the charges of improper job behavior and inadequate job performance as a pretext to propose his termination because he is black. Thus, in his defense, Elliott had the same burden of proving pretext as contained in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089 (1981).

Elliott claimed Shearon had discriminated against him since he became extension leader in 1976, simply because he is black. I can find no evidence sufficient to support that allegation. To the contrary, it appears to this hearing examiner that Shearon and Elliott's district supervisors were unusually lenient with and supportive of Elliott throughout this period even to the point of relinquishing their supervisory authority to Elliott's "professional" discretion.

I cannot agree with Elliott's claim that Shearon's Order prohibiting him from making official visits to golf courses or otherwise visiting golf courses during working hours was in retaliation for his civil rights efforts relative to golf clubs. I do conclude however, that there was sufficient evidence relative to golf to cause a supervisor to be apprehensive about an employee under such circumstances being seen on golf courses during working hours. I conclude that Shearon, as would be any extension leader, was within his right, under the circumstances, to make an effort to correct what he perceived as a problem or potential problem situation and should make such an effort regardless of the race of the employee involved. Whether or not I question the propriety of Shearon's actions is not the issue. In my view, after listening to some 28 days of testimony and argument and thoroughly reviewing this record, Shearon would have acted similarly under the circumstances, if Elliott had been Caucasian or of any other race.

I further find no proof that Elliott's change in job assignment, changed in 1969 from being a 4-H agent to the small farm family program, was discriminatory. His claim of discrimination was based on the allegation that the program deals only with low-income families who are predominately black, and that his transfer was to permit

him to work only with blacks. This was not substantiated by the proof. To the contrary, the proof clearly shows that more small farm families in Madison County grossing less than \$10,000 annually from agricultural sales, are white than are black. Granted, Elliott may have encountered difficulty in getting white farmers to cooperate and participate in his program, although some testified in his behalf; all the more reason for strong support and assistance from his supervisors. Whether or not he received such assistance, which he claims he did not, I cannot find discrimination in this change of assignment.

Elliott's claims of failure to receive promotions or be promoted to extension leader because of his race are not well founded. The evidence is clear that Elliott never availed himself of the opportunity to go back to graduate school under the AES liberal continuing education policy for extension agents. Furthermore, there is no evidence of record that Elliott was paid less than other agents with comparable experience.

Elliott claims that he was discriminated against in that his assignments called for large scale farm surveys whereas other Madison County agents were not required to make such surveys. However, I conclude that the evidence of record is sufficient to show that the purpose and importance of the small farm survey program was a special program with national impetus and the assignment justified. Furthermore, as stated *supra*, after Hinton developed an organizational plan for moving forward on this small farm program in Tennessee, Elliott had an opportunity to use a program aid to assist him in making the surveys but declined. While this may not have been in keeping with the AES policy guidelines set forth by Hinton as to how to get the job done, Elliott, an associate extension agent was allowed to decide how it was to be done in Madison County. Under the circumstances where there had been

continuous allegations of lack of planning, getting benchmark data on small farms, etc. in effect allowing the success or failure of a program of national impetus to turn on an agent's decision not to use a program aid to assist him in doing the surveys, reflects anything but discrimination.

Elliott further claims that Downen, Shearon, Luck, Turner, Coley, Murray, Korwin, and the white members of the MCAEC conspired together to get him fired because of his race. As stated, supra, I cannot presume to know what took place outside the parameters of this hearing or in the minds of people involved. The evidence does not support this claim. However, thorough review of the entire record leads me to believe that a greater effort could have been made on the part of Elliott's supervisors in fully informing the MCAEC on Elliott's past performance based on his official ratings and in working more closely with Elliott to resolve what was perceived as problems beginning as early as 1976. For example, the record shows that Associate Dean Hinton was assigned the state-wide responsibility for the success or failure of the small farm family program; yet, there is no evidence of record to show that he was ever made aware of a problem in Madison County or that he was ever in any way involved other than providing guidelines for state-wide participation. Furthermore, Elliott testified that Assistant Dean Hicks, who is the state EEO officer and responsible for handling civil rights related matters for the AES, told him that he was told to "keep hands off", and not get involved in this particular hearing situation. It is a matter of record that Hicks was not in any way involved in this hearing. I find no evidence that he, as EEO officer, either voluntary or by directive of Dean Downen made any effort to resolve problems which appeared to this hearing officer to be his responsibility.

While a presumption may be raised, I cannot conclude from the foregoing that Elliott was discriminated against because of his race. The entire evidence of record will be given appropriate weight in considering a remedy.

It was claimed by Elliott that Shearon's annual performance evaluations, notes of meetings, and many of Shearon's letters, especially after October 20, 1981 were either forged, created after-the-fact, or pretextual documents to cover Shearon's racial bias. Elliott claimed that Shearon did not deny that Elliott did not receive a copy of all of Shearon's notes, letters or memoranda to Luck, Turner and Downen.

While open communications between supervisor and subordinates is always desirable, there is no requirement that a supervisor must notify a subordinate that he is taking notes or that he is talking to his superiors about the subordinate's performance or behavior. While the timeliness and manner of documentation relative to the charges herein must be taken into consideration with respect to what weight, if any, it carries in support of the charges, I find no good reason to believe that had Elliott been of another race that his situation would have been handled any differently.

As another example of alleged discrimination, Elliott claimed that Shearon's demand for his mileage records for three years was discrimination against him. It was found, supra, that while there was a failure on Elliott's part to keep mileage records in the standard AES mileage books, he was reimbursed for mileage officially claimed during the period in question which creates a strong inference that he was however following acceptable Madison County Office practice. By the same reasoning I cannot conclude that Downen's selection of Madison County as the District

One county to check mileage records was anything other than by chance rather than design. Although the initial request from Downen was for one month, Shearon for some reason requested one year, and subsequently at Downen's request mileage books for three years were requested, a finding of discrimination would be speculative. Again, I cannot conclude that this would have been handled differently had Elliott been of another race.

Elliott further charged Shearon with racial discrimination in not asking black businesses to be financial sponsors of the 1981 Jackson Farm Business Week, that he was never appointed as a superintendent of the fair held in Madison County each year, and that the MCAEC acted on the basis of race in recommending his removal from the county.

It is a well-settled rule that an employer such as the UTAES cannot be held responsible for statements by private individuals. *Silver v. KCA*, supra, Elliott was at all times an employee of The University of Tennessee and not Madison County. This was stated clearly in *State ex rel. Butler v. Alexander*, 634 S.W. 2d 59 (Tenn. App. 1982) as follows:

The extension service is an agricultural service which is part of The University of Tennessee, and employees of the service are actually employees of the University (634 S.W. 2d at p. 598).

Elliott further claimed that Shearon discriminated against him in his assignment to work at the "chicken shack" during the fair and also that white citizens acting as 4-H volunteers at the chicken shack treated him in a discriminatory manner by monopolizing the duty at the cash register while Elliott had to "sweat it out" over an open fire cooking chickens. The "chicken shack" was a

4-H barbeque chicken sales activity at the fair. That the AES is not responsible for the acts of private citizens was stated, supra. Furthermore, the testimony of Shearon, Butler and Elliott showed that it had been an assignment for many years for all male agents to help cook chicken each year at the "chicken shack". Moreover, it was undenied that agents John Butler and Robert Elliott would each year prior to the fair go to the chicken shack to renovate it, and do any necessary repairs and that they frequently used Elliott's personal equipment such as paint sprayer, automatic nailing machine, etc.

An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing charges against employee, resulting in these proceedings were based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him.

REASONS FOR THE DECISION

Due to the magnitude of the charges brought against employee in this proceeding, and the numerous additional charges and issues relating thereto, the policy reasons for the decision on each charge and related subcharges were included, supra, within the body and context of the findings and conclusions.

REMEDY

In accordance with the foregoing findings and conclusions, and summary thereof I find that the employer, UTAES has succeeded in proving its charges: (1) that

employee played golf during working hours, (2) of improper job behavior at the Madison County field day on July 24, 1981, (3) that employee made and charged personal phone calls to the Madison County Extension Office telephone in violation of UTIA work rule #22, and (4) that employee violated UTIA work rule #13 in that he directed profane expletives at private citizen, Tommy Coley, at the Madison County livestock field day on July 24, 1981.

Employer failed in its charges: (1) that employee engaged in the commercial business of making and installing cabinets during working hours, (2) of improper job behavior at the Murray Truck Lines on June 18, 1981, (3) that he violated UTIA work rule #4, (4) that he violated UTIA work rule #25, insubordination or refusal to follow instructions, and (5) of inadequate work performance in that he failed in a timely and proper manner to complete assignments given to him pursuant to his job description, and failed to carry out instructions given to him by his supervisors.

This hearing examiner declined to rule on the charge against employee that he made harassing telephone calls to Jack Barnett, a resident of Gibson County, considering it in the best interest of justice to await the outcome of the pending charge through the Tennessee Criminal Court process.

Finally, it is my opinion that employee has failed in his defense in proving that the charges against him were a pretext, or cover up for racial discrimination by employer, AES.

The record of this hearing is replete with evidence that employer considers Robert Elliott to be an employee who has the capabilities of doing excellent work as an

extension agent with an "agricultural programs assignment". The record is also clear that Shearon did make an effort to motivate and assist Elliott, but was "frustrated and disappointed", in his efforts, I conclude, not only by Elliott's lack of response but by either his inability to communicate the situation to his supervisors or their unwillingness to listen. Furthermore, it was obvious that assignments were not always clear and it was equally obvious that Elliott failed to perform some assignments that were clear, but this failure to perform was condoned although perhaps not by Shearon, in fact, by his official rating and a failure to officially reprimand or discipline him.

While the documentary evidence offered by employer relating to behavior and performance after August 27, 1981, at which time the MCAEC recommended that Elliott be removed from employment from Madison County, was considered and given weight as deemed appropriate in relating to continuing behavior and performance, the specific charges against employee primarily relate to the period 1976 up to and including the July 24, 1981 incident at the Madison County livestock field day and in the opinion of this hearing examiner must be weighed accordingly in prescribing a remedy.

Therefore, in accordance with the foregoing findings and conclusions, it is my opinion that the best interest of justice will be served by giving employee another chance of proving that he is capable, and willing to provide a needed service to AES clientele as an agricultural extension agent and to give employer an opportunity to show that it has the capabilities and inclination to supervise Elliott in such activities.

In considering the relationship that obviously now exists between Shearon and Elliott, the obvious breakdown

of communication and cooperation between them that it would be very difficult "if not impossible", for either of them to "bury the hatchet" and let bygones be bygones and work together in a harmonious relationship in the Madison County Agricultural Extension Office. It is my feeling that the situation that existed in the Madison County Office at the time of this hearing was not a result of either Elliott, Shearon or his supervisors incapacibilities or incompetence, but rather a breakdown of communications and a failure to cooperate with each other in making a serious attempt to remedy the situation when it first became a problem, rather than waiting until it reached a point of obvious "no return".

I, therefore, herein order that Elliott be reassigned and for a period of 12 months beginning within 60 days after the entry of this initial order, unless a petition for appeal, the agency gives notice of its intention to review, or a petition for reconsideration is timely filed, under the direct supervision of Associate District Supervisor, Gene Turner and District Supervisor, Haywood Luck. It is strongly recommended, though not mandatory that the reassignment be in the small farm program area. Whether or not employee is assigned responsibilities in a specific county, including Madison County, or whether his assignment includes more than one county in District One or whether he is housed in the District One Extension Office or elsewhere shall be left to the discretion of Luck, Turner and the AES. Elliott's specific assignment relative to small farm programs and in accordance with his current job description, except that he shall report directly to Turner and Luck, may remain essentially unchanged under this order at the discretion of the AES.

However, prior to the reassignment, under the direct supervision of Associate Dean of Agricultural Programs,

Dr. Troy Hinton, Elliott's assignment shall be reworked or redone and specifically outlined in writing, including a clearly outlined plan for evaluating performance which shall be explained to, and the understanding of acknowledged by Elliott. It is strongly recommended that Hinton along with Luck and Turner meet with Elliott to go over the assignment and make sure that employer and employee are communicating. Furthermore, it is strongly recommended that Assistant Dean, Dr. Billy G. Hicks, AES State EEO officer meet with Elliott and his district supervisors early in this period and that he be available to work with them in the future to assist in resolving further questions involving this employee which relate specifically to his EEO responsibilities.

At the end of the 12 month period, assuming satisfactory behavior and performance, employee may remain in this assignment under the direction of Turner and Luck or be reassigned to regular county duty at the discretion of the AES.

It is further ordered that the August 5, 1981 warning letter from Downen to Elliott, relative to the Murray Truck Lines incident and the MBO rating for the fiscal year ending June 30, 1982 be removed from employee's personnel file. The said rating shall be held in abeyance indefinitely. In the alternative, if this can be construed as contrary to UTAES official policy, employee shall be assigned a satisfactory rating for that period.

A record of the final results of this UAPA contested case hearing may be retained in employee's personnel file.

In accordance with T.C.A. Sec. 4-5-315, the parties herein have the right to file an appeal from this initial order within ten days after entry. Petition for appeal from this order shall be filed in the office of Dr. W. W.

Armistead, Vice President for Agriculture, 102 Morgan Hall, The University of Tennessee, Knoxville, Tennessee 37901 before 5:00 p.m. EST on the tenth day following the entry of this order.

The ten-day period for a party to file a petition for appeal or for the agency to give notice of its intention to review the initial order on the agency's own motion shall be tolled by the submission of a timely petition for reconsideration of the initial order pursuant to T.C.A. Sec. 4-5-317, and a new ten-day period shall start to run upon disposition of the petition for reconsideration. Petitions for reconsideration must be filed, within ten days after entry of this initial order in the office of this hearing examiner at 117 Morgan Hall, The University of Tennessee, Knoxville, Tennessee 37901, stating the specific grounds upon which relief is requested.

If this initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency on its own motion the petition for reconsideration shall be disposed of first, unless the agency determines that action on the petition for reconsideration has been unreasonably delayed.

This initial order, shall in accordance with T.C.A. Sec. 4-5-314, become a final order unless reviewed in accordance with the provisions of T.C.A. Sec. 4-5-315.

Entered this 4th day of April, 1983.

/s/ B. H. Pentecost

B. H. Pentecost

Assistant Vice President for
Agriculture

The University of Tennessee
Institute of Agriculture and
Administrative Judge and Hearing
Examiner

(Filed July 9, 1985)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 84-5692

ROBERT B. ELLIOTT,
Plaintiff-Appellant,

v.

THE UNIVERSITY OF TENNESSEE, et al.,
Defendants-Appellees.

Before: KEITH and MARTIN, Circuit Judges; and ED-
WARDS, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed.

It is further ordered the appellees' requests for attorneys' fees and costs for defense of a frivolous appeal are denied. Plaintiff-Appellant shall recover from Defendants-

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Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman

Clerk

Issued as Mandate: July 31, 1985

COSTS: FOR APPELLANT

Filing fee\$

Printing\$1810.50

Total\$1810.50

A True Copy.

Attest:

/s/ Nancy Schulken

Deputy Clerk

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2559

ROBERT BUCKHALTER,
Plaintiff-Appellant,

vs.

PEPSI-COLA GENERAL BOTTLERS, INC., ROGER
THOMAS KIEKHOFER, & ROBERT FRIEND,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 83 C 3493—Nicholas J. Bua, *Judge.*

ARGUED APRIL 23, 1985—DECIDED JULY 18, 1985

Before BAUER and COFFEY, *Circuit Judges*, and GRAY,
*Senior District Judge.**

COFFEY, *Circuit Judge.* The plaintiff, Robert Buckhalter, appeals the ruling of the United States District Court for the Northern District of Illinois that his claims of race discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a) (1982), and 42 U.S.C. § 1981 (1982) are barred by the doctrine of *res judicata*. We affirm.

*The Honorable William P. Gray, Senior District Judge of the Central District of California, is sitting by designation.

I

The record reveals that the defendant, Pepsi-Cola General Bottlers, Inc. ("Pepsi-Cola"), hired the plaintiff, Robert Buckhalter, in September 1975, as a production line employee at its 51st Street plant in Chicago, Illinois. On June 10, 1978, Pepsi-Cola discharged Buckhalter, a black male, for violating Rule of Conduct IV-11, which prohibits employees from possessing alcoholic beverages or drugs on company property. Some two days thereafter, on June 12, 1978, Pepsi-Cola also discharged David Lynch, a white male, and James Ault, a white male, for violating Rule of Conduct IV-11. Buckhalter, Lynch, and Ault each filed grievances through their union representative and a grievance hearing was held for each employee pursuant to the terms of the collective bargaining agreement between Pepsi-Cola and Teamsters Local 744. Following the presentation of evidence at the grievance hearings, the Industrial Relations Manager upheld the discharge of Buckhalter and Lynch but reinstated Ault, finding that the employer failed to introduce sufficient evidence to establish that Ault had, in fact, violated the company rule. See *In re Buckhalter and Pepsi-Cola General Bottlers, Inc.*, 7 Ill. H.R.C. Rep. 96, 103-07 (1982) ("*In re Buckhalter*"). Buckhalter appealed the decision of the Industrial Relations Manager to the Labor Management Committee, consisting of three union representatives and three representatives from the Association of Chicago Bottlers of Carbonated Beverages, and they, likewise, upheld Buckhalter's discharge.

In August 1978, Buckhalter filed a charge with the Illinois Fair Employment Practice Commission ("FEPC"), alleging that Pepsi-Cola had engaged in race discrimination because it reinstated Ault, a white employee, but did not reinstate Buckhalter, a black employee. The FEPC con-

ducted an investigation into the discharge incident and in March 1979, found a lack of substantial evidence to support Buckhalter's claim. Buckhalter requested that the FEPC reconsider its decision and on May 29, 1979, the FEPC reversed its prior determination and issued a complaint of race discrimination in violation of section 3(a) of the Illinois Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, ¶ 853 (1978), which provided in pertinent part that:

"It is an unfair employment practice: (a) For any employer because of the race, color, religion, national origin or ancestry of an individual to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment. . . ."¹

In accord with the provisions of Illinois law, the FEPC assigned Buckhalter's race discrimination complaint to Chief Administrative Law Judge Patricia Patton, who conducted an adjudicatory hearing of four days in length, in March 1980. Buckhalter and Pepsi-Cola, who were each represented by counsel, engaged in extensive pre-hearing discovery and submitted exhaustive legal memoranda in support of their respective positions. At the hearing, the parties examined and cross-examined witnesses in accord with the applicable Illinois Rules of Evidence. The parties introduced some ninety exhibits and documents including statistical data of the patterns and racial breakdowns of Pepsi-Cola's employee discharges. In addition, the parties made opening and closing statements to the Administra-

1. In July 1980, the Illinois legislature repealed the Fair Employment Practices Act, Ill. Rev. Stat. ch. 48, § 851 *et seq.*, replacing it with the Illinois Human Rights Act, Ill. Rev. Stat. ch. 68, ¶ 1-101(a) *et seq.* (1983).

tive Law Judge ("ALJ") and argued numerous evidentiary issues. At the close of the four-day adversarial proceeding, the testimony was compiled in five volumes of transcripts totaling 680 pages in length.

In July 1980, the Illinois legislature replaced the FEPC with the Illinois Human Rights Commission ("Commission" or "HRC"). See Ill. Rev. Stat. ch. 68, ¶ 1-101 *et seq.* (1983). The investigatory and adjudicatory powers of the HRC are identical to those of the FEPC but under the new law, the Illinois Department of Human Rights ("Department") conducts all investigations and the Commission conducts all adjudicatory hearings. The Illinois law provides that the Department of Human Rights is "[t]o issue, receive, investigate, conciliate, settle, and dismiss charges" Ill. Rev. Stat. ch. 68, ¶ 7-101(B). According to the law, a complainant may file a written charge with the Department within 180 days after the occurrence of an alleged civil rights violation. The Department notifies the respondent of the filing of the written charge within ten days and subsequently conducts an investigation of the alleged discriminatory practice. If the Department determines that substantial evidence of a civil rights violation exists, it initially attempts to remedy the situation through a conciliation conference with the respondent. If no agreement can be reached, the Department files a complaint with the HRC. See Ill. Rev. Stat. ch. 68, ¶ 7-102(F).

The HRC is a body composed of nine members, appointed by the Governor of Illinois, that is authorized "to hear and decide by majority vote requests for review and complaints filed" Ill. Rev. Stat. ch. 38, ¶ 8-102. Within five days after a complaint is filed by the Department, the HRC serves a copy of the complaint upon the respondent and notifies the parties of a scheduled adjudicatory hearing. The complainant and respondent may appear

at the hearing with counsel to examine and cross-examine witnesses. The parties are afforded compulsory process "to compel the attendance of a witness or to require the production for examination of any relevant books, records or documents whatsoever." Ill. Rev. Stat. ch. 68, ¶ 8-104(C). The testimony taken at the hearing must be under oath or affirmation and a transcript of the entire proceeding must be compiled and filed with the HRC. Moreover the testimony elicited at the hearing "is subject to the same rules of evidence that apply in courts of [the State of Illinois] in civil cases." Ill. Rev. Stat. ch. 68, ¶ 8-106(E). The ALJ issues written findings of fact, reviews the evidence presented, and recommends that the Commission either affirm, modify, or dismiss the claim of employment discrimination. The ALJ submits the findings of fact and recommendations to a three-member panel of the HRC which considers the evidence along with the oral argument presentations of the complainant and respondent. The HRC may then "adopt, modify or reverse in whole or in part the findings and recommendations of the hearing officer." Ill. Rev. Stat. ch. 68, ¶ 8-107(E)(1). The law of Illinois requires that the HRC adopt the ALJ's findings of fact unless they are "contrary to the manifest weight of the evidence." Ill. Rev. Stat. ch. 68, ¶ 8-107(E)(2). The HRC issues a written order and decision that is published in the Illinois Human Rights Commission Reporter "to assure a consistent source of precedent." Ill. Rev. Stat. ch. 68, ¶ 8-110. If either the complainant or respondent wants to contest the HRC decision, they may file an application for rehearing and if granted the case is reheard by the entire nine-member Commission. Moreover, the parties are at all times entitled to appeal the HRC decision and obtain additional judicial review in the Illinois Circuit Court system pursuant to the Illinois Administrative Review Act. See Ill. Rev. Stat. ch. 110, ¶ 3-

101 *et seq.* On appeal, the Illinois Circuit Court's standard of review is that "the Commission's findings of fact shall be sustained unless the court determines that such findings are contrary to the manifest weight of the evidence." Ill. Rev. Stat. ch. 68, ¶ 8-111(A)(2).

In March 1982 the ALJ issued her findings of fact and conclusions of law that were published, in compliance with Illinois law, in the Illinois Human Rights Commission Reporter. See *In re Buckhalter*, 7 Ill. H.R.C. Rep. at 102-15. The ALJ acknowledged that she conducted "a rather lengthy hearing in this matter" and that "despite all of complainant's detailed testimony on the events of the night in question, I have no reason to believe that Robert Buckhalter's discharge came about as a result of an indiscriminate imposition of discipline upon black employees." *Id.* at 108-09. In a detailed legal analysis of Buckhalter's claim, the ALJ initially recited that under the law of Illinois, a *prima facie* case of race discrimination "may be established by Complainant's showing that (1) he belongs to a racial minority, (2) that he was treated in a particular way by Respondent and (3) that similarly situated whites were not treated in the same manner." *Id.* at 109 (quoting *L.Q. Hampton, and National Baking Co.*, 3 Ill. F.E.P. Rep. 40, 42 (1976)). The respondent must then "come forth with a legitimate non-discriminatory reason for the difference in treatment" *Id.* at 110. The ALJ ruled that Pepsi-Cola had established a legitimate, non-discriminatory reason "primarily because of the treatment afforded Daniel Lynch, a white employee discharged on Rule IV-11, grounds 2 days after [Buckhalter]." *Id.* According to the ALJ, "I find it quite difficult to infer that the difference in treatment between Robert Buckhalter and James Ault was based upon race when I am faced with the fact that Daniel Lynch, a white man, re-

ceived the same treatment as Robert Buckhalter" *Id.* at 111. Buckhalter attempted to establish that Pepsi-Cola's legitimate, non-discriminatory reason for the discharge was merely pretextual by introducing statistical data of the patterns and racial breakdown of Pepsi-Cola's employee discharges. Pepsi-Cola countered with its own statistical data and the judge ruled that "[t]he comparative data relating to the . . . decisions to discharge both white and black employees at the plant in question is too inconsistent to be of probative value." *Id.* at 108. Thus, the ALJ concluded that Buckhalter's evidence was insufficient "to show respondent's given reasons to be pretextual." *Id.* at 114. According to the ALJ, "I have no other basis than the complainant's opinion upon which to conclude that the decision was made on the basis of race." *Id.* at 113. As a result, the ALJ held that Pepsi-Cola "was not guilty of disparate treatment on the grounds of race when it refused to reverse its decision to discharge Robert Buckhalter, and respondent therefore, did not act in violation of Section 3(a) of the [Fair Employment Practices] Act in refusing to do so." *Id.* at 107.

In November 1982, a three-member panel of the Commission affirmed the ALJ's decision on the basis that "the facts contained in the administrative record are not against the manifest weight of the evidence. . . ." *Id.* at 98. The Commission ruled that:

"[t]he evidence concerning the treatment of Lynch was particularly significant because his discharge occurred in circumstances virtually identical to those involving the complainant. Both Lynch and the complainant were observed drinking on Company property by respondent's Security Manager. Both were fired for violating the same company rule. Both discharges were upheld after separate grievance

hearings. Complainant and Lynch were thus similarly situated. The case involving Mr. Ault, on the otherhand [sic], was quite different from the situations involving complainant and Lynch and the Administrative Law Judge was correct in recognizing this dissimilarity."

Id. The Commission further reasoned that Pepsi-Cola "had a valid non-discriminatory reason—doubt as to the sufficiency of its case against Ault—for reinstating Ault but not complainant or Lynch." *Id.* at 99. In response to Buckhalter's claim that he was denied an opportunity to take depositions, the Commission ruled that "[w]e do not believe that the Chief Administrative Law Judge abused her discretion in denying leave to take depositions as there were other means available to complainant to effectuate discovery." *Id.* Thus, the Commission ordered that "the complaint in this matter be dismissed." *Id.* at 101.

Following the HRC decision, Buckhalter requested a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"), rather than obtaining judicial review of the decision in the Circuit Court of Cook County pursuant to the Illinois Administrative Review Act. Buckhalter's legal counsel sent a letter to Pepsi-Cola stating that "in light of the United States Supreme Court decision in *Kremer v. Chemical Construction Corporation*, [456 U.S. 461 (1982) ("*Kremer*")], Complainant will pursue his remedies under Title VII of the Civil Rights Act of 1964. . . ." Buckhalter relied upon the Supreme Court's language in footnote 7 of the *Kremer* opinion that, "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a

State's own court." 456 U.S. at 470 n.7. The EEOC issued a right-to-sue letter on March 7, 1983, and a month-and-a-half later, on May 22, 1983, Buckhalter filed a separate lawsuit in Federal court alleging race discrimination in violation of Title VII, 42 U.S.C. § 2000-e2(a), and 42 U.S.C. § 1981. Buckhalter alleged the same underlying facts and circumstances that he had previously presented, unsuccessfully, to the Illinois Human Rights Commission, in an attempt to support his claim that "PEPSI-COLA GENERAL BOTTLERS, INC., intentionally discriminated against Plaintiff on the basis of his race and color, black, with respect to the conditions and privileges of his employment and by discharging plaintiff from employment and not reinstating plaintiff. . . ." Pepsi-Cola responded to Buckhalter's complaint by filing a motion for summary judgment, claiming that Buckhalter had an opportunity to fully litigate his claim before the HRC and the Illinois state courts, and was thus barred from relitigating the same claim in Federal court under the principle of *res judicata*. Buckhalter argued that under footnote 7 of the *Kremer* opinion he was entitled to a *de novo* review of his claim in Federal court because the HRC decision constituted an unreviewed administrative determination by a state agency.

The district court ruled that "the footnote [in *Kremer*] must be read as applying only to those administrative decisions which are investigatory or otherwise purely administrative in nature and not to determinations in which the administrative agency was empowered to and indeed acted in a judicial capacity." *Buckhalter v. Pepsi-Cola Gen. Bottlers*, 590 F. Supp. 1146, 1149 (N.D. Ill. 1984). The court concluded that because "the HRC acted in its judicial capacity" and Buckhalter "was afforded sufficient due process in the litigation of his ad-

ministrative claim," the Title VII claim was barred by *res judicata*. *Id.* at 1150. The court further reasoned that "because there is 'no reason to distinguish civil rights actions brought under section[] 1981 . . . from suits brought under Title VII for purposes of applying *res judicata*'" Buckhalter's section 1981 claim was also barred. *Id.* (quoting *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982)). Thus, the district court granted Pepsi-Cola's motion for summary judgment. On appeal, Buckhalter claims that the district court judge failed to adhere to the Supreme Court's direction in footnote 7 of the *Kremer* decision to allow a trial *de novo* in Federal court for "un-reviewed administrative determinations by state agencies. . . ." 456 U.S. at 470.

II

We begin our analysis with a review of the Supreme Court's decision in *Kremer*, where the plaintiff, Reuben Kremer, alleged that his employer, Chemical Construction Corp., discharged and refused to rehire him due to his national origin and Jewish faith. Kremer filed a charge of national origin discrimination with the EEOC, which referred the claim to the New York State Division of Human Rights ("NYHRD").² Following a thorough investigation of Kremer's complaint, the NYHRD concluded that the evidence failed to establish probable cause to believe that the employer engaged in national origin discrimination. Kremer appealed to the NYHRD Appeals Board which affirmed the agency's investigative determination as "not arbitrary, capricious or an abuse of dis-

2. The NYHRD is the state agency responsible for enforcing the civil rights laws of New York, prohibiting employment discrimination. See N.Y. Exec. Law §§ 295(6)(b), 296(1)(a) (McKinney 1982).

cretion." *Kremer*, 456 U.S. at 464. Pursuant to New York law, Kremer filed a petition with the Appellate Division of the Supreme Court of New York to review the Appeals Board decision and, at the same time, he filed his charge of employment discrimination a second time with the EEOC. The New York state court unanimously "confirmed" the Appeals Board decision and, in the separate Federal action, the EEOC ruled that the record was insufficient to establish reasonable cause to believe that Kremer's employer engaged in national origin discrimination. Nevertheless, the EEOC issued a routine right-to-sue letter and Kremer filed a Title VII employment discrimination lawsuit in the United States District Court for the Southern District of New York.

The district court granted the employer's motion to dismiss the Title VII claim on the basis that "*res judicata* would bar a Title VII claim where the plaintiff had previously sought state court review on the same question presented to the federal courts." *Kremer v. Chemical Const. Corp.*, 477 F. Supp. 587, 590 (S.D.N.Y. 1979). The Second Circuit affirmed the dismissal of Kremer's Title VII claim, likewise ruling that Kremer was precluded from relitigating his claim of employment discrimination in Federal court under the doctrine of *res judicata*. See *Kremer v. Chemical Const. Corp.*, 623 F.2d 786, 788 (2d Cir. 1980). The narrow issue before the United States Supreme Court was:

"whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim as meritless when the state court's decision would be *res judicata* in the State's own courts."

Kremer, 456 U.S. at 463. The Court began its analysis by noting that 28 U.S.C. § 1738³ "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Id.* at 466. The Supreme Court ruled that the judgment of the Appellate Division of the New York Supreme Court, confirming the NYHRD Appeals Board decision, clearly precluded *Kremer* from bringing a separate employment discrimination lawsuit in the New York state court system. The Supreme Court thus reasoned that "[b]y its terms . . . § 1738 would appear to preclude *Kremer* from relitigating the same question in federal court." *Id.* at 467.

Despite the obvious applicability of section 1738, *Kremer* argued "[f]irst . . . that in Title VII cases Congress intended that federal courts be relieved of their usual obligation to grant finality to state court decisions [and] . . . [s]econd . . . that the New York administrative and judicial proceedings in this case were so deficient that they are not entitled to preclusive effect in federal courts. . . ." *Id.* The Supreme Court dismissed *Kremer*'s first contention reasoning that "[n]othing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court." *Id.* at 473. The Court added that "[s]imilar views were expressed in 1972 when Congress reconsidered whether to give the EEOC adjudicatory and enforcement powers." *Id.* at 474. The Supreme Court thus concluded that:

3. 28 U.S.C. § 1738 (1982) provides, in pertinent part, that:

"[t]he . . . judicial proceedings of any court of any such State . . . shall have the same full faith and credits in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of any such State, Territory or Possession from which they are taken."

"[i]t is sufficiently clear that Congress, both in 1964 and 1972, though wary of assuming the adequacy of state employment discrimination remedies, did not intend to supplant such laws. We conclude that neither statutory language nor the congressional debates suffice to repeal § 1738's longstanding directive to federal courts."

Id. at 476. In response to *Kremer*'s second contention, the Court stated that "the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." *Id.* at 480-81. The Court noted, however, that under New York law the NYHRD is to conduct an investigation and determine whether or not there is probable cause to believe that employment discrimination, in fact, exists. In New York, "[b]efore this determination of probable cause is made, the claimant is entitled to a 'full opportunity to present on the record, though informally, his charges against his employer or other respondent, including the right to submit all exhibits which he wishes to present and testimony of witnesses in addition to his own testimony.'" *Id.* at 483 (quoting *State Div. of Human Rights v. New York State Drug Abuse Comm'n*, 59 A.D.2d 332, 336, 399 N.Y.S.2d 541, 544 (1977)). In addition, the complainant is entitled to have an attorney present, request that the NYHRD issue subpoenas, and rebut evidence submitted by the respondent. If the NYHRD determines that probable cause exists to support the charge of employment discrimination, the complainant is entitled to a public hearing on the merits of his claim. The Supreme Court further noted that "judicial review in the Appellate Division is available to assure that a claimant is not denied any of the procedural rights to which he was entitled and that the

NYHRD's determination was not arbitrary and capricious." *Id.* at 484. In view of this "panoply of procedures," the court concluded that "Kremer received all the process that was constitutionally required in rejecting his claim that he had been discriminatorily discharged" *Id.* at 483-84. Thus, the Supreme Court affirmed the dismissal of Kremer's Title VII claim:

"[b]ecause there is no 'affirmative showing' of a 'clear and manifest' legislative purpose in Title VII to deny *res judicata* or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits"

Id. at 485.

In *Kremer*, the plaintiff appealed the decision of the NYHRD Appeals Board to the New York state court and received a state court judgment on his claim of employment discrimination. The Supreme Court held that the Federal court was required to give preclusive effect to the judgment of the New York state court because 28 U.S.C. § 1738 "requires federal courts to give the same preclusive effect to *state court judgments* that those judgments would be given in the courts of the State from which the judgments emerged." *Id.* at 466 (emphasis added). According to the Court, because there was "a *state court judgment* affirming that a claim of employment discrimination is unproved," the doctrine of *res judicata* barred Kremer's Title VII claim in Federal court. *Id.* at 485 (emphasis added). In contrast to the facts in *Kremer*, Buckhalter did not receive a state court judgment nor any judicial review of his claim by an Illinois state court and thus, by its express terms, section 1738 does not apply in

the present case. See, e.g., *McDonald v. City of West Branch, Mich.*, 104 S. Ct. 1799, 1802 (1984) (arbitration is not a state court judicial proceeding and thus section 1738 does not apply to arbitration awards).⁴ We hasten to note however, that the inapplicability of section 1738 does not end our *res judicata* analysis. In footnote 26 of the *Kremer* opinion the Supreme Court acknowledged the doctrine of "administrative *res judicata*," stating that "so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, *res judicata* is properly applied to decisions of an administrative agency acting in a 'judicial capacity.'" 456 U.S. at 485 n.26 (citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) ("*Utah Construction*")). In *Kremer*, the NYHRD simply

4. We note that there is support for the proposition that the decision of a state administrative agency, such as the Illinois Human Rights Commission, acting in a judicial rather than investigatory capacity, is a judicial proceeding of a state court for purposes of 28 U.S.C. § 1738. See, Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 Mich. L.R. 1485, 1521 (1981). We decline to expand section 1738 to include adjudicatory hearings of a state administrative agency, but we do realize that under Illinois law, "*res judicata* . . . affixes to administrative decisions that are judicial in nature." *Pedigo v. Johnson*, . . . Ill. App. . . . , 474 N.E.2d 430, 432 (1985). In Illinois, "decisions of an administrative agency can have *res judicata* effect in a proper case. Generally, this will be where the determinations are made for a purpose similar to those of a court and in proceedings which are 'adjudicatory', 'judicial', or 'quasi judicial'." *Godare v. Sterling Steel Casting Co.*, 103 Ill. App.3d 46, 51, 430 N.E.2d 620, 623 (1981). Indeed, in *Hughey v. Industrial Com'n*, 76 Ill. 2d 577, 394 N.E.2d 1164 (1979), the Illinois Supreme Court held that the principle of *res judicata* precluded an employee, who failed to appeal the denial of workmen's compensation benefits by the Illinois Industrial Commission, from relitigating a claim for "the same expenses and disability for which recovery was initially sought." 76 Ill. 2d at 580, 394 N.E.2d at 1165. Thus, applying the relevant case law of Illinois, it is clear that the final, unappealed decision of the HRC, acting in a judicial capacity, would preclude Buckhalter from relitigating his claim of race discrimination against Pepsi-Cola in Illinois state court. As a result, if section 1738 did apply in the present case, the doctrine of *res judicata* would bar Buckhalter from relitigating his claim of race discrimination in Federal court.

investigated Kremer's claim and determined that the evidence failed to establish probable cause to believe that the employer had engaged in national origin discrimination. Because the NYHRD found a lack of probable cause at the initial step of administrative review, the agency did not proceed to the second step of review and conduct an adjudicatory hearing on the merits of Kremer's national origin race discrimination claim. Thus, the Supreme Court never reached the doctrine of "administrative *res judicata*," which applies only when the administrative agency acts in a judicial capacity. In the present case, the Illinois administrative agency investigated Buckhalter's discrimination claim, found substantial evidence to support the claim, and then conducted an adjudicatory hearing of four days in length to determine the merits of Buckhalter's claim. In view of the fact that Buckhalter received an adjudicatory hearing before the HRC, we must determine whether the well-recognized doctrine of "administrative *res judicata*," alluded to by the Supreme Court in footnote 26 of the *Kremer* opinion, applies in the present case to preclude relitigation of Buckhalter's race discrimination claim in Federal court.

In *Utah Construction*, the Supreme Court explained that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata*" 384 U.S. at 422. The Supreme Court held that the doctrine of "administrative *res judicata*" precluded relitigation in Federal court of a claim presented to the Board of Contract Appeals, acting in a judicial capacity because "both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings." *Id.* Since

the Supreme Court's seminal decision in *Utah Construction*, courts have consistently realized:

"[W]hen an agency conducts a trial-type hearing, makes findings, and applies the law, the reasons for treating its decision as *res judicata* are the same as the reasons for applying *res judicata* to a decision of a court that has used the same procedure [R]es judicata applies when what the agency does resembles what a trial court does."

4 K. Davis, *Administrative Law Treatise* § 21:3, at 51-52 (2d ed. 1983). Indeed, Restatement (Second) of Judgments § 83 (1982) provides that:

"(1) . . . a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court.

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of *res judicata* only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication. . . ."

According to the Restatement (Second) of Judgments, the "essential elements of adjudication" include adequate notice; the right of parties to present evidence on their own behalf and rebut evidence presented by the opposition; a formulation of issues of law and fact; a final decision; and the procedural elements necessary to conclusively determine the issue in question. The rationale underlying the doctrine of "administrative *res judicata*" is that:

"[w]here an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments. Correlatively, the social importance of stability in the results of such decisions corresponds to the importance of stability in judicial judgments. The rules of *res judicata* thus generally have application not only by courts with respect to administrative adjudications but also by agencies with respect to their own adjudications."

Restatement (Second) of Judgments § 83 comment b, at 268.

This court has, on numerous occasions, recognized the doctrine of "administrative *res judicata*." For example, in *Patzer v. Board of Regents*, Nos. 84-1267, 84-1411, slip op. at 9 & n.5 (7th Cir. June 4, 1985) we observed "the generally accepted rule" that "[f]inal adjudicative decisions of administrative agencies are often *res judicata* as to the claims decided." Similarly, in *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 746 F.2d 375 (7th Cir. 1984), we acknowledged that:

"where an agency acts in a judicial capacity and resolves disputes properly before it, the agency's findings may be given preclusive effect as long as the procedures utilized by the agency do not prevent the party against whom estoppel will be applied from having a fair opportunity to present its case."

746 F.2d at 377-78. Again in *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982), we stated that "issues of fact

determined by an administrative agency acting in a judicial capacity may collaterally estop future relitigation of administratively determined issues." 685 F.2d at 198. So too, in *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978), we recognized that "[w]ith the *Utah Construction* decision leading the way, the courts have continued to extend the doctrine of *res judicata* to the decisions of administrative agencies in appropriate cases." 570 F.2d at 1321. In the present case, the HRC conducted a thorough investigation of Buckhalter's race discrimination claim and concluded that substantial evidence existed to support the charge of employment discrimination. As a result, Buckhalter was entitled to fully adjudicate his claim against Pepsi-Cola in an adversarial proceeding before an ALJ. The initial issue before this court, under the doctrine of "administrative *res judicata*," is whether the HRC was acting in a judicial capacity when it considered and ruled upon Buckhalter's claim of race discrimination.

The record reveals that once the HRC received Buckhalter's claim of race discrimination, it appointed Chief Administrative Law Judge Patricia Patton to preside over the matter. The parties engaged in extensive pre-trial discovery and in March 1980, the ALJ conducted an adjudicatory hearing of four days duration. Buckhalter and Pepsi-Cola, each represented by counsel throughout the proceeding, filed exhaustive memoranda of law in support of their respective positions and at the hearing each party examined and cross-examined witnesses in accord with the applicable Illinois Rules of Evidence. In addition, the parties introduced some ninety exhibits and documents, including statistical data of the patterns and racial breakdowns of Pepsi-Cola's employee discharges. The parties made opening and closing statements to the ALJ and argued numerous evidentiary issues. At the close of

the four-day adversarial proceeding, the testimony was compiled in five volumes of transcripts totaling 680 pages in length. The ALJ thoroughly reviewed the record and in March 1982, issued a detailed, fourteen page opinion that was published in the Illinois Human Rights Commission Reporter, pursuant to Illinois law. See *In re Buckhalter*, 7 Ill. H.R.C. Rep. at 102. The opinion contained thorough findings of fact, conclusions of law, and a cogent legal analysis applying the relevant facts to the Illinois law of employment discrimination. In evaluating Buckhalter's claim of race discrimination, the ALJ used the burden of proof framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). This burden of proof framework, which is the same one used in Federal court to evaluate an employment discrimination claim under Title VII, requires that (1) the plaintiff establish a *prima facie* case of employment discrimination; (2) the defendant articulate a legitimate, non-discriminatory reason; and (3) the plaintiff establish that the proffered reason is simply a pretext. The ALJ ruled that Pepsi-Cola had established a legitimate, non-discriminatory reason for discharging Buckhalter and that Buckhalter had failed to prove that the reason was merely pretextual. A three-member panel of the Commission issued a second published opinion affirming the ALJ's findings of fact as "not against the manifest weight of the evidence" and affirming the ALJ's conclusions of law as supported by the evidence. *In re Buckhalter*, 7 Ill. H.R.C. Rep. at 98.

In view of the fact that the HRC judicial proceeding was conducted just as a trial in Illinois state court, there can be little doubt that the HRC was acting in a judicial capacity. This court held, in *EZ Loader Boat Trailers, Inc.*

v. Cox Trailer, Inc., that the Trademark Trial and Appeal Board was acting in a judicial capacity because there was "an adversary proceeding. Both parties . . . were represented by attorneys before the Board; both presented evidence and submitted briefs." 746 F.2d at 378. In the present case, Buckhalter and Pepsi-Cola were each represented by attorneys, engaged in pre-hearing discovery, filed memoranda of law in support of their respective positions, examined and cross-examined witnesses, introduced exhibits, and argued numerous evidentiary issues throughout the adversarial proceeding. Moreover, the ALJ made extensive findings of fact and conclusions of law, properly applied the burden of proof framework for a claim of employment discrimination as set forth by the Supreme Court, and a three-member panel of the Commission affirmed the ALJ's decision in a published opinion. We thus hold that the HRC acted in a judicial capacity in dismissing Buckhalter's complaint on the basis that Pepsi-Cola established a legitimate, non-discriminatory reason for Buckhalter's discharge and Buckhalter failed to prove the reason was a pretext.

In addition to the administrative agency acting in a judicial capacity, the parties must have a full and fair opportunity to litigate their case before the doctrine of "administrative *res judicata*" will bar relitigation of a claim in Federal court. The state administrative agency's "findings may be given preclusive effect as long as the procedures utilized by the agency do not prevent the party against whom estoppel will be applied from having a fair opportunity to present its case." *Id.* at 377-78. In the present case, Buckhalter was represented by an attorney at all times during the pre-hearing discovery and the four-day adjudicatory hearing. In addition, Buckhalter was entitled to contest the ALJ's findings of fact and con-

clusions of law before a three-member panel of the HRC. The panel reviewed not only the merits of Buckhalter's claim but also the procedural and evidentiary rulings made by the ALJ. Finally, Buckhalter was entitled to appeal the HRC decision to the Cook County Circuit Court pursuant to the Administrative Review Act of Illinois. In view of the thorough procedural and evidentiary safeguards afforded Buckhalter in the HRC adjudicatory hearing, we hold that Buckhalter had a full and fair "opportunity to litigate" his claim of race discrimination. See, e.g., *Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 705-06 (7th Cir. 1982), cert. denied, 460 U.S. 1102 (1983) (judicial proceedings of the Illinois FEPC satisfy due process requirements).

The final inquiry is whether the principles of *res judicata* apply in this case to preclude Buckhalter from relitigating his claim of race discrimination in Federal court. The law in this circuit is that *res judicata* applies when there is "(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Lee v. City of Peoria*, 685 F.2d at 199 (citing *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), cert. denied, 454 U.S. 878 (1981)). In the present case, Buckhalter clearly obtained a final judgment on the merits of his race discrimination claim, as the ALJ found that "despite all of complainant's detailed testimony on the events of the night in question, I have no reason to believe that Robert Buckhalter's discharge came about as a result of an indiscriminate imposition of discipline upon black employees." *In re Buckhalter*, 7 Ill. H.R.C. Rep. at 109. The ALJ ruled that Pepsi-Cola had established a legitimate, non-discriminatory reason for discharging Buck-

halter and that Buckhalter failed "to show [Pepsi-Cola's] given reasons to be pretextual." *Id.* at 114. The HRC affirmed the ALJ's decision on the basis that "the facts contained in the administrative record are not against the manifest weight of the evidence. . . ." *Id.* at 98. According to the HRC, Pepsi-Cola "had a valid non-discriminatory reason—doubt as to the sufficiency of its case against Ault—for reinstating Ault but not complainant or Lynch." *Id.* at 99. The fact that Buckhalter failed to appeal the HRC's decision to the Circuit Court of Cook County does not affect the finality of the decision because an adverse decision "from which no appeal has been taken is *res judicata* and bars any future action on the same claim" *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.4 (1981). See also C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4427, at 270 (1981). Moreover, Buckhalter's claim of race discrimination in violation of Title VII and 42 U.S.C. § 1981 is identical to the claim of race discrimination litigated before the HRC. The district court properly found that the Federal lawsuit and the HRC proceeding involved "identical claims and issues." *Buckhalter v. Pepsi-Cola Gen. Bottlers*, 590 F. Supp. at 1148. Accord *Unger v. Consolidated Foods Corp.*, 693 F.2d at 705 ("the Illinois prohibition against discrimination in employment, Ill. Rev. Stat. ch. 48, § 853, is at least as broad as that of Title VII"). Indeed, the ALJ, just as a Federal court in a Title VII case, used the burden of proof framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-03, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 252-56, to analyze Buckhalter's claim and rule that Pepsi-Cola established a legitimate, non-discriminatory reason for Buckhalter's discharge. Finally, the parties in the Federal lawsuit, Buck-

halter and Pepsi-Cola, are the same parties who appeared in the HRC judicial proceeding.⁵ In view of this evidence, and the fact that the HRC was clearly acting in a judicial capacity when it dismissed Buckhalter's claim of race discrimination, we hold that under the doctrine of "administrative *res judicata*," as alluded to in footnote 26 of the *Kremer* opinion, Buckhalter is barred from relitigating his claim of race discrimination in Federal court. *Accord*, *Zywicki v. Moxness Products, Inc.*, No. 82-C-1334, slip op. at 2-4 (E.D. Wis. March 28, 1985).

Despite the clear applicability of the doctrine of "administrative *res judicata*" in the present case, Buckhalter argues that under the express language of footnote 7 of the *Kremer* opinion, all "unreviewed administrative determinations by state agencies" are entitled to *de novo* review in Federal court. 456 U.S. at 470 n.7. According to Buckhalter, this language includes even those cases where the administrative agency has conducted an adjudicatory hearing on the merits of the employment discrimination claim. Buckhalter finds support for this overly broad interpretation of footnote 7 in three recent district court opinions, *Reedy v. State of Fla., Dept. of Educ.*, 605 F. Supp. 172 (N.D. Fla. 1985), *Parker v. Danville Metal Stamping Co.*, 603 F. Supp. 182 (C.D. Ill. 1985), and *Jones v. Progress Lighting Corp.*, 595 F. Supp. 1031 (E.D. Pa. 1984). We believe that these cases misinterpret footnote 7 and fail to acknowledge the language in footnote 26 of the *Kremer* opinion that under the doctrine of "administrative *res*

5. Buckhalter added Roger Thomas Kiekhofer, the manager of Pepsi-Cola's 51st Street plant, and Robert Friend, the Industrial Relations Manager, as defendants in his section 1981 claim. Though Kiekhofer and Friend were not parties to the HRC adjudicatory proceeding, Buckhalter's claim of race discrimination against them is precluded under the doctrine of defensive collateral estoppel. *See Blonder-Tongue v. University Foundation*, 402 U.S. 313, 329 (1971); *Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976).

judicata," the decision of a state administrative agency acting in a judicial capacity is to be given *res judicata* effect. Moreover, these cases fail to make the critical distinction that in *Kremer* the NYHRD exercised only its investigative authority in determining whether or not there was probable cause to support Kremer's discrimination claim. Because the NYHRD found a lack of probable cause to support Kremer's claim at the initial step of the administrative review process, the NYHRD did not conduct an adjudicatory hearing on the merits of Kremer's national origin discrimination claim.

In footnote 7 of the *Kremer* opinion, the Supreme Court stated that "[s]ince it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts." 456 U.S. at 470 n.7. The Court's reference to the EEOC in footnote 7 is extremely helpful and enlightening as the law is clear that the EEOC's sole function in employment discrimination cases is to "make an investigation thereof." 42 U.S.C. § 2000e-5(b) (emphasis added). Following the investigation, if the EEOC determines that "there is reasonable cause to believe that the charge [of discrimination] is true," *id.*, it attempts to conciliate the matter with the employer, and if unsuccessful, it files a civil action "in the appropriate United States district court," 42 U.S.C. § 2000e-5(f)(1). The EEOC clearly has no authority to conduct an adjudicatory hearing, instead, if it determines after a complete investigation that there is reasonable cause in the record to establish employment discrimination, the EEOC files a complaint in Federal district court where the complainant is entitled to a trial on the merits. In stark contrast, in many states,

such as Illinois, the state administrative agency conducts a thorough investigation, and if it concludes that there is substantial evidence of employment discrimination, the state administrative agency, acting in a judicial capacity, conducts an adjudicative hearing with all of the concomitant procedural and evidentiary safeguards. In footnote 7, the Supreme Court was clearly referring to the state administrative agency in its investigatory capacity as it analogized the state agency to the EEOC, a Federal agency that is authorized to act only in an investigatory capacity. The import of footnote 7 is that neither an investigatory determination of the EEOC nor an investigatory determination of a state administrative agency precludes a trial *de novo* in Federal court. The Supreme Court made clear, however, in footnote 26 of the *Kremer* opinion, that when the state administrative agency acts in a judicial capacity, its ruling on the claim of employment discrimination is entitled to preclusive effect in the Federal court under the doctrine of "administrative *res judicata*."

We add that our application of the "administrative *res judicata*" doctrine in the present case is to be narrowly construed and used only in those situations where the state administrative agency, while acting in a judicial capacity, has reviewed the merits of the complainant's employment discrimination claim and has ruled that the evidence does not support such a claim. In those situations where the complainant prevails on his claim of discrimination before the state administrative agency, he may be entitled to bring a subsequent Title VII suit in Federal court to supplement his state remedies. See, e.g., *Patzer v. Board of Regents*, Nos. 84-1267, 84-1411 slip op. at 10 (7th Cir. June 4, 1985). Indeed, as the Supreme Court clearly recognized in *New York Gaslight Club, Inc. v. Cary*, 447 U.S. 54 (1980) ("*Gaslight Club*"), in a Title VII action:

"[i]nitial resort to state and local remedies in mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief."

* * *

"Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums."

447 U.S. at 65, 67. See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."). In *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), this court was faced with the very situation alluded to by the Supreme Court in *Gaslight Club*. The complainant prevailed on his employment discrimination claim before the state administrative agency and then filed a Title VII action to obtain a supplemental backpay award. This court held that "the fact that final judgment was issued in the state proceedings does not bar this [supplemental] action nor deprive plaintiffs of their right to relief in federal court." *Batiste v. Furnco Construction Corp.*, 503 F.2d at 451. In the present case, however, the HRC, acting in its judicial capacity, determined that the evidence did not support Buckhalter's claim of employment discrimination. Pursuant to footnote 26 of the *Kremer* opinion and the doctrine of "administrative *res judicata*," the Federal courts are to give preclusive effect to this final adjudicatory determination of the Illinois state administrative agency. Accordingly, we agree with the district

court and hold that the doctrine of "administrative *res judicata*" bars Buckhalter's Title VII claim in Federal court. Moreover, in the present case there is "no reason to distinguish civil rights actions brought under section [] 1981 . . . from suits brought under Title VII for purposes of applying *res judicata*," and thus we hold the doctrine of "administrative *res judicata*" also bars Buckhalter's section 1981 claim in Federal court. *Lee v. City of Peoria*, 685 F.2d at 199.

III

We affirm.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

NOV 12 1985

JOSEPH F. SPANIOLO
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

vs.

ROBERT B. ELLIOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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No. 85-588

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, et al.,
Petitioners,

vs.

ROBERT B. ELLIOTT,
Respondent.

=====

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

Statement of the Case

This case presents a question already decided by this Court: whether an unreviewed decision of a state administrative agency may be accorded res judicata effect in a subsequent federal court proceeding

in an action under 42 U.S.C. § 2000(e) (Title VII), 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988.

Robert Elliott, respondent herein, is a black employee of the University of Tennessee Agricultural Extension Service. Appendix at A1. On December 18, 1981, respondent was advised that he was to be terminated from his job. Four days later, respondent filed an administrative appeal under the Tennessee Uniform Administrative Procedure Act (Appendix at A1-A2), and on January 5, 1982, he filed a complaint in federal district court alleging violations of, inter alia, Title VII, and Sections 1981 and 1983.

An administrative hearing was held before the Assistant Vice President for Agriculture of the University's Institute of Agriculture, who acted as hearing examiner and administrative judge.

Appendix at A182. The hearing examiner was aware of Elliott's pending federal action and explicitly stated that the agency had no jurisdiction to determine¹ the merits of a civil rights claim. The hearing examiner explicitly rejected the notion that he should attempt any resolution of a claim of racial discrimination: "... if jurisdiction exists ... it exists in ... Federal District Court and [the] employee may not try his civil rights actions in this forum," Appendix at A45. The hearing examiner ruled that the University should transfer respondent rather than terminate his employment, because only four of the eight charges raised by the employer were substantiated.

¹ The examiner permitted some evidence of racial discrimination to be introduced "to give ... a more full understanding of the matter ..." and in the nature of an affirmative defense to the employer's charges. Appendix at A44.

Appendix at A77-179. The hearing examiner's initial order was adopted by the Vice President of the University's Institute of Agriculture, thereby making final the agency decision. Appendix at A33-35.

The Tennessee statute provides for judicial review of a final agency decision by the State chancery court; however, that review is limited to a review of the administrative record to determine whether the agency decision is "arbitrary, capricious, or unsupported by substantial evidence. Appendix at A5.

Respondent did not seek state court review of the final agency determination, but rather elected to pursue his federal claims in federal court by proceeding with his already filed action. Appendix at A7, 29. The district court granted petitioner's motion for summary judgment on

the grounds that it had no jurisdiction to review the administrative agency decision and that the agency decision was entitled to res judicata effect. Appendix at A31-32.

The Sixth Circuit, applying decisions of this Court, reversed the district court's dismissal of respondent's claims.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied, because the court below, in holding that an unreviewed administrative decision should not have preclusive effect in a subsequent federal court action raising federal claims of racial discrimination, correctly applied the decisions of this Court. Review of this case because of an asserted conflict would be inappropriate, given the facts of this case.

ARGUMENT

Reasons for Denying the Writ

- I. THE SIXTH CIRCUIT CORRECTLY HELD THAT A DISTRICT COURT SHOULD NOT GIVE RES JUDICATA EFFECT TO AN UNREVIEWED ADMINISTRATIVE DECISION AND THAT RULING IS CONSISTENT WITH DECISIONS OF THIS COURT

Petitioners assert that the decision below conflicts with the decisions of this Court in Allen v. McCurry, 449 U.S. 90 (1980) and Migra v. Warren City School District, ___ U.S. ___, 79 L.Ed.2d 56 (1984). This asserted conflict does not exist; the Sixth Circuit's decision comports with the holdings in those cases, as well as the holding in Kremer v. Chemical Construction Co., 456 U.S. 461 (1982).

Each of these cases concerned the preclusive effect of state court decisions on subsequent federal court proceedings. In Allen, this Court dealt with the question of whether issues that were actually litigated in a state court were entitled to preclusive effect in a Section 1983 action. Based on the determination that Section 1983 had not repealed 28 U.S.C. § 1738, this Court held that issue preclusion would apply.² The question left open in Allen, i.e., whether the same rule would apply where the federal issue could have been, but was not, litigated in the state proceeding, was decided by this Court in Migra, where this Court held

² Section 1738 provides, in part, as follows:

... judicial proceedings [of any state]
... shall have the same full faith and
credit in every court within the United
States ... as they have ... in the courts
of [that state]

that a state court judgment would be given claim preclusive effect in a Section 1983 action. Since the instant case involved no state court judgment, there is obviously no conflict between it and these two cases.

In Kremer, this Court applied those holdings to a Title VII action. Throughout that opinion, the Court refers only to state court decisions. This Court explicitly stated that "unreviewed administrative determinations by state agencies ... should not preclude [de novo] review even if such a decision were to be accorded preclusive effect in a state's own courts." 456 U.S. at 470 n. 7. See also id. at 487 (Justices Blackmun, Marshall and Brennan, dissenting) and id. at 508-509 (Justice Stevens dissenting). Petitioners attempt to read Kremer as making a distinction between decisions of

state administrative agencies with only investigatory authority and those with adjudicatory authority. Petition at 8. Respondent submits there is no support for such a distinction in any of those three cases.

Moreover, the decision below comports with the principles announced in Chandler v. Roudebush, 425 U.S. 840 (1976) and Alexander v. Gardner-Denver, 415 U.S. 36 (1974). In Chandler, this Court held that the right to a trial de novo on Title VII claims, available to private sector employees, extended to federal employees as well. Two years earlier, in Alexander, this Court had examined congressional intent and concluded,

... Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability by this forum.

415 U.S. at 60 n. 21. The Sixth Circuit has acted on that duty and has properly determined that respondent is entitled to pursue his claims in court, relying on the decisions of this Court.

II. THE WRIT SHOULD BE DENIED BECAUSE THE FACTUAL ISSUES CONSIDERED BY THE SIXTH CIRCUIT ARE VERY DIFFERENT FROM THOSE CONSIDERED IN OTHER CIRCUITS

Including the instant case, according to the Petition, five courts of appeal have issued decisions post-Kremer that examined the question of whether state administrative agency determinations should be accorded res judicata effect in a subsequent Title VII action in federal court.³ Only one of those decisions,

³ See, Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985); Heath v. Morrell & Co., 768 F.2d 245 (8th Cir. 1985); Elliott v. University

Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985), arguably poses a conflict with the holding below.⁴ However, respondent does not recommend plenary review of the instant case, since it concerns a decision rendered, not by an independent body whose specific mandate is to decide employment discrimination claims, but rather by a hearing examiner in the employ of the very body accused of discrimination and

of Tennessee, 756 F.2d 982 (6th Cir. 1985); Bottini v. Sadore Management Corp., 764 F.2d 116 (2d Cir. 1985); Ross v. Communications Sattellite Corp., 759 F.2d 355 (4th Cir. 1985).

⁴ Petitioners assert that there is also a conflict between the Sixth Circuit and the Third Circuit; however, inasmuch as the affirmance of the district court in O'Hara v. Board of Education, 590 F.Supp. 696 (D.N.J. 1984) was without an opinion (760 F.2d 259 3d Cir. 1985), it is impossible for this Court to determine the basis for the Third Circuit's holding and therefore whether there is a conflict and, if so, the nature of any conflict.

reviewed by that same body. Supra, pp. 2, 4. Cf. Chandler v. Roudebush, supra, 425 U.S. at 863 n.39 (congressional insistence on de novo review based on potential "conflict of interest"). Thus, the asserted conflict is not a clear one, and respondent would submit that the best course would be for this Court to deny the petition to permit further consideration by the remaining courts of appeal and deal⁵ with the issue at a later date.

⁵ Even fewer circuits have considered the question of whether state administrative decisions should be accorded preclusive effect in subsequent federal court proceedings under §§ 1981 and 1983 post-Kremer. See, Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42 (2d Cir. 1985) (according preclusive effect to determination by Commissioner of Motor Vehicles of probable cause for arrest and drivers' license revocation) and Moore v. Bonner, 695 F.2d 799 (4th Cir. 1982) (refusing to accord preclusive effect to unappealed decision of a county board of education).

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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November 1985

No. 85-588

Supreme Court, U.S.

FILED

JAN 24 1986

F. SPANIOLO,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, et al., *Petitioners,*

v.

ROBERT B. ELLIOTT, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Petition for Certiorari Filed Oct. 3, 1985

Certiorari Granted Dec. 2, 1985

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Jan. 14, 1982—Plaintiff Elliott's original complaint filed in U. S. District Court for the Western District of Tennessee, Jackson Division.

Feb. 18, 1982—Defendant University of Tennessee's Motion to dissolve restraining order, to dismiss complaint or for summary judgment, with disciplinary charge letter dated December 18, 1981, attached as Exhibit L to affidavit of Mr. Lloyd Downen, filed.

Oct. 24, 1983—Plaintiff's motion for TRO and/or temporary stay of agency order and for preliminary injunctive relief filed.

Oct. 24, 1983—Initial Order of Administrative Law Judge filed as Attachment A to plaintiff's motion for TRO and/or temporary stay of agency order.

Oct. 24, 1983—Final Agency Order filed as Attachment C to plaintiff's motion for TRO and/or temporary stay of agency order.

Feb. 6, 1984—Defendants' amended motion for summary judgment filed.

May 2, 1984—District Court's Memorandum Decision on defendant's motion for summary judgment filed.

May 8, 1984—Judgment of the District Court filed.

July 9, 1985—Opinion and Judgment of the Court of Appeals for the Sixth Circuit filed.

PLAINTIFF'S COMPLAINT

Filed January 14, 1982

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
JACKSON DIVISION**

ROBERT B. ELLIOTT,)
Plaintiff)
VS.)
THE UNIVERSITY OF TENNESSEE)
P. O. Box 1071)
Knoxville, Tennessee 37901)
THE UNIVERSITY OF TENNESSEE)
INSTITUTE OF AGRICULTURE)
P. O. Box 1071)
Knoxville, Tennessee 37901)
THE UNIVERSITY OF TENNESSEE)
AGRICULTURAL EXTENSION SERVICE)
P. O. Box 1071)
Knoxville, Tennessee 37901)
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UNIVERSITY OF TENNESSEE)
AGRICULTURAL EXTENSION SERVICE)
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Knoxville, Tennessee 37901)
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EDWARD J. BOLING, PRESIDENT)
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JIMMY HOPPER,)
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MRS. ROBERT CATHEY)
Oakfield, Tennessee)
MURRAY TRUCK LINES, INC.)
519 E. Chester)
Jackson, Tennessee 38301)
TOM KORWIN, SHOP MANAGER)
Murray Truck Lines, Inc.)
519 E. Chester)
Jackson, Tennessee 38301)
and)
TOMMY COLEY)
Old Denmark Road)
Jackson, Tennessee 38301,)
Defendants)

COMPLAINT

1. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C., Secs. 1331 and 1343, this being a suit wherein the matter in controversy exceeds the sum or value of \$10,000.00 exclusive of interest and costs, arising under the Constitution and laws of the United States, and this being a suit in equity authorized by law, Title 42, U.S.C. Sec. 1983, to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a State of rights, privileges, and immunities secured by the Constitution and laws of the United States; and to recover damages and other relief under the provisions of said 42 U.S.C., Sec. 1983. The rights, privileges and immunities sought to be redressed by this action are rights, privileges and immunities secured by the First and Thirteenth Amendments, and by the due process and equal protection clauses of the Fourteenth Amendment, to the Constitution of the United States, by Title 42 U.S.C., Secs. 1981, 1985, 1986, 1988 and 2000d and e, as hereinafter more fully appears. Pendent jurisdiction over state law questions is invoked.

2. At all times material herein the following was true:

(a) plaintiff, Robert B. Elliott, hereafter plaintiff, was a black citizen of and residing in Gibson County, Tennessee, and the United States of America, employed as an Agricultural Extension Agent by the Agricultural Extension Service of the University of Tennessee Institute of Agriculture, identified more particularly hereinafter.

(b) defendant, The University of Tennessee, hereafter defendant UT, was an institution of higher learning and a public body corporate established by law of the State of Tennessee as a land grant institution under the Federal Land Grant Act of 1862 for white students only and subsequently desegregated involuntarily by Federal Court Decisions under the Fourteenth Amendment to the Constitution of the United States.

(c) the defendant, Agricultural Extension Service of The University of Tennessee Institute Of Agriculture, hereafter defendant AES, was an administrative agency or department of The University of Tennessee established by State Law to take advantage of Federal monies and services made available to the State under the provisions of the Smith Lever Act of 1914, as amended (7 U.S.C., Sec. 341 et seq.) It is a public agency.

(d) defendants, Edward J. Boling, Willis W. Armistead and M. Lloyd Downen, were President, Vice President for Agriculture, and Dean of the Institute of Agriculture, of defendant UT respectively and are hereafter referred to as defendants Boling, Armistead and Downen, respectively. In said capacity they are charged with administrative responsibilities at the levels indicated for the operation of defendants UT and AES.

(e) defendant, Haywood W. Luck, is a District Supervisor of defendant AES in administrative charge of its operations in several West Tennessee counties including Madison County, the County in which plaintiff is employed by defendant AES.

(f) defendant, Curtis Shearon, is an Extension Leader employed by defendant AES and in charge of its Madison County Office.

(g) defendants, Billy Donnell, Arthur Johnson, Jr., Mrs. Neil Smith, Jimmy Hopper and Mrs. Robert Cathey, are members of the Agricultural Extension Service Committee, hereafter AESC of Madison County, Tennessee, an agency utilized by defendant AES in its operations in said County.

(h) defendant, Tommy Coley, is a citizen of Madison County, Tennessee, used by said defendant AES in its operations in Madison County, Tennessee.

(i) defendant, Murray Truck Lines, Inc., is a corporation, operating in Madison County, Tennessee, with business offices at 519 East Chester Street, Jackson, Tennessee 38301 and defendant, Tom Korwin, is Shop Manager and, on information and belief, an officer or managing agent of said defendant, Murray Truck Lines, Inc. Said defendants are hereafter called respectively defendants Murray and Korwin.

(j) all defendants are white and are sued herein both in their official and individual capacities.

3. This is a proceeding for preliminary and permanent injunctive relief and for damages by plaintiff against all defendants seeking:

(a) an injunction restraining defendants, UT, AES, Boling, Downen, Armistead, Luck, Shearon, Donnell, Johnson, Smith, Hopper, Cathey and Coley, from discriminating or acting against plaintiff or any other person or persons employed, utilized or affected in any way in any agricultural extension or related programs operated or participated in by any of said defendants in the State of Tennessee on account of race or color or in a racially discriminatory manner; and from failing and refusing to disestablish existing racial discrimination and

segregation in the operation of said AES programs including but not limited to the compensation and job assignments of black personnel, the limitation of or racial discrimination or segregation in the program benefits made available to black citizens who are the intended beneficiaries of said AES programs or involved therein in any way, and the disestablishment of existing racial segregation and discrimination in all of said programs administered by or connected with any of said defendants, including but not limited to back pay and other relief for past discrimination to plaintiff and other class members so entitled.

(b) specific preliminary and permanent injunctive relief requiring all defendants herein to cease and desist from attempts to discharge or cause the discharge of plaintiff and/or to otherwise penalize him pursuant to false allegations of inadequate job performance and inadequate job behavior and to punish plaintiff by derogatory warning letters and supervisory harassment because of his race and because of his protest against racial discrimination by various of the defendants including but not limited to defendants, Coley, Murray, Korwin and Shearon.

(c) injunctive relief against the use of Federal or other public funds for purposes unauthorized by law, including but not limited to said racial discrimination and segregation.

(d) restraint of the defendants and each of them from conspiring to do any of the foregoing acts or from participating in or causing such acts to be done.

(e) damages against the defendants in sum of One Million Dollars (\$1,000,000.00) for deprivation of his rights under the statutory and constitutional provisions

cited in paragraph 1 hereinabove, by the actions and omissions of defendants charged herein.

4. Plaintiff brings this action, pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure on his own behalf and on behalf of all other persons in Tennessee who are similarly situated and/or affected by the policies, practices, customs and usages complained of herein which violate not only the rights of plaintiff and other black employees, applicants for employment, continuance of employment or re-employment as personnel in said defendants UT and AES, but also the rights of black infant and adult citizens who are intended beneficiaries of said AES, who are subjected to racial discrimination and segregation therein by virtue of the discriminatory restraints upon plaintiff and other AES personnel and otherwise, as to whose rights there is a close nexus with those of plaintiff and other black AES personnel here sought to be vindicated and in whose behalf plaintiff also brings this suit. The members of the class on whose behalf plaintiff sues are on information and belief more than 200 persons and are so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class, the claims of the plaintiff are typical of the claims of the class and the plaintiff will fairly and adequately protect the interest of the class. Further this action meets the prerequisites of Rule 23(b)(1) and the defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. For many years past, the defendant UT, acting under color of the laws of the State of Tennessee, including State segregation statutes, pursued a policy, practice,

custom and usage of operating an exclusively white institution of higher learning in the State of Tennessee and, in connection therewith, also operated an exclusively white Institute of Agriculture which in turn established and/or operated an exclusively white Agricultural Extension Service taking advantage of and using the Federal funds available under said Smith Level Act of 1914. After Congress established the Act of 1890 requiring that Federal funds be distributed also to black State Institutions, the defendant UT sought and continued to receive virtually all Federal Land Grant Funds despite the existence of a black Land Grant Institution at Tennessee State University. The AES was and is headed by defendant Downen with the majority of administrative personnel and specialists quartered at the UT Campus. For supervision purposes defendant AES is divided into five districts each having oversight responsibilities for 16 to 22 of 95 County Offices established by defendant UT throughout the State. The District Offices are headed by a District Supervisor and the County Offices are headed by an Extension Leader. Before the Civil Rights Act of 1964, notwithstanding the decision of the Supreme Court of the United States in the Segregation Cases, defendant UT continued to permit AES to be organized and to provide services through a dual system whereby black employees served blacks and white employees generally served whites. The white staff was quartered at UT Knoxville and the black staff was quartered at the YMCA Building in Nashville. On information and belief it was only after prodding by Federal Officials that the dual system was merged sometime after 1964. Nevertheless, defendant AES continued and continues to discriminate in the following particulars:

(a) failure and refusal to implement an effective affirmative action plan as required by law;

(b) insufficient action to integrate and eliminate racial discrimination in homemaker demonstration clubs and other educational activities;

(c) failure and refusal to racially integrate and eliminate racial discrimination and segregation in 4-H Clubs and their activities and programs;

(d) failure and refusal to address low minority participation in agricultural programs and community resource development programs;

(e) persistent refusal to eliminate blatant discrimination against black persons in hiring, job assignment and actual salaries;

(f) blatant discrimination against black employees in promotions, training and continuing education;

(g) discrimination in the establishment and operation of agricultural extension committees wherein black citizens are either excluded or limited in their membership and said committees are permitted to discriminate racially against black AES personnel and against black citizens entitled to the benefit of the program;

(h) permitting discrimination against black participants in AES programs by local white officials including but not limited to Judges in educational programs sponsored by defendant AES.

6. Plaintiff was employed by defendant AES as an Assistant Extension Agent on 12 September 1966 and assigned to the Madison County Office where he has been employed ever since. At time of said employment he was a 1962 graduate of Tennessee State University with a BS in Agronomy. He was promoted to Associate Extension Agent on 1 July 1974 and still holds that position.

Although the racially dual system had ostensibly merged by the time of his employment racial segregation continued in that plaintiff and other black Extension Agents were assigned almost exclusively to work with predominantly black citizens. When schools were segregated racially black agents served separate black 4-H Clubs. When the schools were desegregated black agents, including plaintiff, were relieved of 4-H Club assignments and assigned to a previously non-existent make-shift job designated as "working with low income or small farm families" who turned out to be predominantly black. The AESC which materially affects AES operations and influences the employment and assignment of its personnel, was exclusively white in most counties, including Madison, until 1975 when plaintiff protested and, notwithstanding said protest, is still exclusively white in many counties. On information and belief there are no black personnel in the AES above the level of Extension Agent in the entire State of Tennessee except for one black woman employed as a Nutrition Specialist in the Home Office at Knoxville. The West Tennessee Experiment Station, which has approximately 50 personnel, has only 3 black employees: a secretary, farm worker and janitor respectively. Plaintiff's complaints about such racial discrimination included the following:

(a) oral complaint against all-white AESCs about 1975 resulting in first historical appointment of a single black citizen on the Madison County AESC. A second black person became a member only by virtue of election by the County Commission of one of its black members as a committee member about three years ago.

(b) written complaint on 23 January 1981 placed in the Agency's Civil Rights file protesting racial discrim-

ination in defendant Shearon and Madison County AESC failing and/or refusing to utilize and treat in an equitable fashion black leaders, students and staff personnel in connection with 4-H Club events.

(c) oral protest in 1967, 1968 and thereafter to and including 1981 of the refusal of AES staff members and local white AESC members to accord black citizens and staff personnel the right to be called Mr. and Mrs. on the same basis as white personnel.

(d) an oral protest about 1978 of the use by a Knoxville UT Administrative Official of the term "great white hope" in referring to job goal aspirations when speaking to an integrated group of extension agents in West Tennessee.

(e) a written complaint by letter dated 27 July 1981 to defendant Downen regarding an incident at a 4-H Club event sponsored by the Madison County AESC wherein defendant Coley referred to a black child as a "nigger".

(f) a written complaint dated 22 October 1981 addressed to defendant Shearon wherein plaintiff complained of black business persons and entities being excluded from a list to be contacted in connection with the sponsorship and fund raising for Farm-City Week.

(g) the subsequent written complaint by plaintiff to defendant Shearon in October 1981 regarding the failure and refusal of defendant Shearon to involve black persons on the program of said Farm-City Week.

7. Following said complaint of plaintiff about the Coley-"nigger" incident, all of individual defendants set about or, on information and belief, conspired to set about

a course of events calculated and designed to result in the plaintiff's removal from defendant AES. It was a part of said conspiracy that defendants, Downen, Luck and Shearon seized upon an incident which occurred in June 1981 wherein the plaintiff, while off duty, had protested about eight racially insulting signs casting racial slurs upon black persons which were placed in the business windows of defendant Murray, and conspired with defendants Murray and Korwin, to solicit and secure a letter from Korwin to Downen accusing plaintiff of referring to Mr. Murray as a "white racist and other racially oriented slurs" as a means of adversely affecting plaintiff's employment. Pursuant to this conspiracy said letter, stating falsely that plaintiff threatened Mr. Murray by saying: "I hope I catch you out somewhere, because I'll be waiting", and other false statements, was sent by Korwin to Downen and Downen then called plaintiff in on 5 August 1981 and placed a letter in plaintiff's file reprimanding him for "unacceptable job behavior" on 5 August 1981. Although a copy of plaintiff's complaint letter of 27 July 1981 was sent by defendant Downen to defendant Coley, so far as plaintiff was made aware defendant Coley was not required to answer same and no action was taken against Coley in response to said complaint. Thereafter, on information and belief, defendants Downen, Luck and Shearon, conspired with defendants Donnell, Johnson, Smith, Hopper and Cathey, whereby meetings of the Madison County AESC were held on 17 and 27 August 1981 in which it was proposed to recommend to defendant Downen that plaintiff be removed as an Extension Agent and Shearon privately went to one or more of said AESC members requesting them to vote for said removal. The two black members, Ivey and Boone, refused to do so, while all four of the defendant white members, two of whom were rel-

atives by marriage of defendant Coley, voted to recommend plaintiff's removal.

8. It was also a motivation of defendants' actions and/or a part of said conspiracy that one or more of the individual defendants were aware of and opposed to efforts which plaintiff had been making, including a suit in Federal Court, to secure the rights of membership and golf privileges in various racially, segregated, exclusively white, country clubs in Gibson and Madison County, Tennessee, and all of the defendants, on information and belief, desired and sought to remove plaintiff from his employment and to damage or destroy him because of his efforts to eliminate racial discrimination in that regard.

9. Plaintiff sought and obtained a recorded conference with defendant Downen and his counsel on 12 October 1981 specifically requesting that said defendant: (a) remove said reprimand of 5 August 1981 regarding the Murray incident from his personnel file; (b) redress plaintiff's complaint against defendant Coley contained in his letter dated 27 July 1981; and (c) cause certain on-going harassment of plaintiff by his immediate supervisor, defendant Shearon, to be discontinued. Said harassment included as of that time such disparate treatment as Shearon demanding that plaintiff produce mileage books when white employees, similarly situated, were not and had not been required to produce or keep same in that manner. Defendant Downen said substantially nothing during said conference and, on information and belief, shortly afterwards made a personal visit to Jackson. Following his visit to Jackson the harassment intensified in the form of discriminatory job assignments, unjustified fault finding, and open attempts by defendant Shearon to establish and place pretextual supervisory complaints in plaintiff's personnel

record on which to base a false claim of inadequate or unsatisfactory job performance. Plaintiff's employment record of 15 years with AES had been unblemished up to the time of his said oral protest against racial discrimination in June 1981 at the office of defendant Murray and his written protest letter of 17 July 1981 about the use by defendant Coley, of a racial epithet toward a black child in a 4-H demonstration proceeding. Subsequently, on 5 November 1981 defendant Downen wrote letters to plaintiff and his counsel officially condoning and attempting to justify the use of racial slurs by defendants, Murray and Coley, refusing to remove defendant Coley as a livestock demonstration judge in AESC proceedings and insisting on continuing the reprimand of plaintiff for his protest of both the Murray and Coley incidents.

10. Shortly afterwards, defendant Shearon attempted to wrap up his campaign of occupational vilification against plaintiff by falsely charging him with the failure to carry out a specific assignment on surveying small farmers throughout Madison County and stating that his over-all job performance was inadequate for the calendar year. Utilizing that letter and said previous letters regarding the Murray and Coley incidents as a basis, defendant Downen then wrote to plaintiff a letter dated 18 December 1981, proposing to terminate his employment immediately on the basis of same and of the alleged recommendation of the Madison County AESC.

11. Plaintiff filed a contest and demanded a hearing under the Uniform Administrative Procedures Act of Tennessee of said action of the defendants in charging him with inadequate or unsatisfactory job performance and job behavior and proposing to discharge him, and of defendant Downen's action in refusing to remove from his personnel file Downen's said letters of 5 August 1981

and 5 November 1981, and defendant Downen's refusal to respond to plaintiff's complaint against defendant Coley or to order plaintiff's said supervisor to stop harassing him because of his race. However plaintiff avers that said harassment continues as of this very day and that, despite said demand for hearing, the defendants are now treating plaintiff as if he were already discharged. His job assignments in effect have been withdrawn in that defendant Shearon has refused to hold the usual office conferences with him for several weeks and, on information and belief, the entire Madison County community has been informed by defendants that plaintiff is discharged and preparations are being made to select his successor. As a result of said actions of defendants, plaintiff has been and is being subjected to loss of professional standing, reputation, experience and development; and to untold humiliation, pain and agony, loss of sleep and suffering which can never be restored or redressed by mere payment of damages and which will injure him irreparably unless he is granted immediate injunctive relief against the actions of the defendants as set out in the above paragraph 5 to 11, both inclusive, which were all made and done pursuant to defendants' historical and continuing policy of racial discrimination against black staff personnel and citizens.

12. Plaintiff has filed a formal complaint with the EEOC against said racial discrimination but will ask for a suit letter because of the lack of time for adequate EEOC investigation and disposition of same and because of said need for immediate injunctive relief.

13. Plaintiff alleges that the actions or omissions of the defendants as outlined hereinabove including but not limited to their said false allegations against him on account of his complaints, actions, speech or protests

against racial discrimination deprive him of rights secured by the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C., Secs. 1981, 1983, 1985, 1986 and 1988 and defame his character and professional reputation and have caused and will cause him professional damage and personal injury as set out above; that same were done deliberately and/or pursuant to a conspiracy on the part of one or more of said defendants to injure him because he is a black person and/or because of his said protests against said racial discrimination, segregation and/or slurs and that he is therefore entitled to damages, both compensatory and punitive.

14. Plaintiff further avers that the imposition of said racially motivated discrimination and segregation upon and against plaintiff and other black persons, including the persons entitled to receive the benefit of said AES program, imposes upon plaintiff and said class a badge of slavery, denies, abridges and intimidates, coerces and interferes with them in the exercise of their rights to free speech and freedom of expression; deprives them of due process of law and equal protection of law and of their statutory rights as set out hereinabove, and constitutes such egregious discrimination against them as to entitle the class as well as plaintiff to said compensatory and punitive damages as hereinafter prayed.

15. There is between the parties an actual controversy as hereinbefore set forth.

WHEREFORE plaintiff respectfully prays that the Court advance this case on the docket and order a speedy hearing of same according to law, and after such hearing:

1. Issue a Temporary Restraining Order And/Or Preliminary Injunction requiring the defendants and each of them to:

(a) immediately refrain and desist from any type of action whatsoever seeking to discharge, withdraw the job assignment or opportunities of or racially discriminate against or harass the plaintiff in any manner in the enjoyment and performance of his duties as an Associate Agricultural Extension Agent; and to promote plaintiff and provide equal pay and other terms and conditions of employment to plaintiff, including but not limited to back pay.

2. That the Court set this case for hearing at an early date and certify same as a class action.

3. That upon the final hearing this Court declare and determine the rights of plaintiff and the class he represents as claimed in this complaint and enter a Decree granting plaintiff and said class all the permanent injunctive relief against the defendants and each of them, their agents, employees and successors, as set forth hereinabove in paragraph 3, 4 and 11 in the body of this Complaint.

4. That the plaintiff have and recover of each and every one of the defendants damages in sum of Five Hundred Thousand (\$500,000.00) Dollars for compensatory damages and Five Hundred Thousand (\$500,000.00) Dollars for punitive damages, totaling One Million (\$1,000,000.00) Dollars.

5. That plaintiff and all class members be awarded back pay and/or damages.

6. Plaintiff prays that this Court will award reasonable counsel fees to his attorneys for services rendered and to be rendered in this case and allow this plaintiff his reasonable costs herein and grant such further, other, additional or alternative relief as may appear to the Court to be equitable and just.

**DEFENDANTS' MOTION TO DISSOLVE RE-
STRAINING ORDER TO DISMISS COM-
PLAINT OR FOR SUMMARY
JUDGMENT**

Filed February 18, 1982

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
JACKSON DIVISION**

(Title Omitted in Printing)

The University of Tennessee, The University of Tennessee Institute of Agriculture, The University of Tennessee Agricultural Extension Service, Dr. Edward J. Boling, University of Tennessee President, Dr. Willis W. Armistead, University of Tennessee Vice President for Agriculture, Dr. M. Lloyd Downen, University of Tennessee Dean of the Agricultural Extension Service, Mr. Haywood W. Luck, District Supervisor, UT Agricultural Extension Service, and Mr. Curtis Shearon, Madison County Extension Leader, (herein called "University of Tennessee Defendants") move the Court as follows:

A. Dissolve restraining order, entered ex parte on January 19, 1982, enjoining defendants from taking any further personnel action against plaintiff.

B. Dismiss this action as to them because the complaint fails to state a claim against said defendants upon which relief can be granted for the following reasons:

1. Plaintiff's complaint is premature and fails to state a justiciable claim because (a) this action is not

ripe for judicial review and (b) the Court should abstain from reviewing this case because of the pending evidentiary, trial type due process hearing afforded and requested by plaintiff under the contested case provisions of The Tennessee Uniform Administrative Procedures Act, T.C.A. §§ 4-5-108, et seq.;

2. Plaintiff does not meet the jurisdictional or criterial prerequisite for injunctive relief;

3. The Court lacks jurisdiction over The University of Tennessee Defendants under 42 U.S.C. § 1983 and 2000d and e because (a) The University of Tennessee is not a person under 42 U.S.C. § 1983; (b) the UT defendants are not personally liable to plaintiff for monetary damage because all of them possess either absolute immunity or a qualified good faith immunity, and (c) the complaint fails the jurisdictional prerequisite for a Title VII action.

C. Alternatively, The University of Tennessee Defendants move the Court for summary judgment in their favor dismissing the action as to them on the grounds that the pleadings and affidavits of Dr. Edward J. Boling, Dr. W. W. Armistead, Dr. M. Lloyd Downen, Mr. Haywood Luck, and Mr. Curtis Shearon, hereto annexed, show that there is no genuine issue as to any material fact and that these defendants are entitled to judgment as a matter of law.

DISCIPLINARY CHARGE LETTER

Filed February 18, 1982

FROM M. LLOYD DOWNEN, DEAN OF
AGRICULTURAL EXTENSION SERVICE
TO PLAINTIFF

Dated December 18, 1981

Dear Mr. Elliott:

I have received a copy of Mr. Curtis Shearon's December 9, 1981 letter regarding your job performance in which Mr. Shearon states that your over-all job performance has been inadequate for this calendar year.

As you know, I have personally given you two written warnings this year regarding your job behavior and performance. Moreover, as you also know the Madison County Agricultural Extension Committee has recommended to me that you be removed from Madison County due to your inadequate job performance.

Due to the serious allegations and incidents of inadequate job performance and inadequate job behavior which have continued this year, I have decided to propose that your employment with The University of Tennessee Agricultural Extension Service be terminated for inadequate job performance and inadequate job behavior.

You have a right to request a hearing to contest these charges of inadequate job performance and job behavior. If you desire to contest these charges, you must file a written request for a hearing with the Business Office within five working days from receipt of this letter. Please send a copy of your hearing request to me.

If you do not request a hearing within five days, the charges of inadequate job performance and inadequate job behavior shall remain uncontested and your employment shall be terminated.

If you do request a hearing, you have the option to select the University's internal hearing mechanism as delineated in Section 500 of the Institute of Agriculture's Personnel Procedure. If you select this hearing procedure, the Director of Business Affairs shall convene a hearing panel to rule on the validity of the proposed discharge. If you choose this procedure, you must notify me and the Business Office at least three days prior to the hearing if you desire to be represented by an attorney. A copy of this internal hearing procedure is attached hereto for your study.

You also have an option to choose a hearing under the contested case provisions of The Uniform Administrative Procedures Act. If you choose this procedure, the University's Vice President for Agriculture will appoint the necessary hearing panel or hearing examiner to hear this case. The hearing examiner will make proposed findings and conclusions to the Vice President for Agriculture who shall render the final decision.

I am enclosing a waiver form, which if you choose the University's internal hearing, you are to return to me indicating that you waive any right to a hearing under The Uniform Administrative Procedures Act. You only have the right to one hearing. Therefore, if you desire a hearing you must decide which type of hearing you want. Basically, the University's internal hearing is more informal than the procedure under The Uniform Administrative Procedures Act.

At either type hearing, the University shall have the burden of proving the charges by a preponderance of the evidence. If either of the charges is sustained, your employment will be terminated. If the charges are not sustained, your employment with the University shall continue.

In the event your employment is terminated, you have the right under the University's internal hearing to appeal the hearing panel's findings to the Vice President for Agriculture, and subsequently to the University President and Board of Trustees if necessary. The decision of the Vice President for Agriculture under The Uniform Administrative Procedures Act is final, and can only be reviewed in court in accordance with the terms of The Uniform Administrative Procedures Act, the pertinent portions of which are attached hereto.

If you do elect a hearing to contest these charges, we shall be glad to establish a hearing date which will not inconvenience you.

**PLAINTIFF'S MOTION FOR TRO AND/OR A
TEMPORARY STAY OF THE
AGENCY ORDER**

Filed October 24, 1983

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
JACKSON DIVISION**

(Title Omitted in Printing)

Now comes the plaintiff, Robert B. Elliott, and moves this Court for a temporary restraining order and/or temporary stay of the decision of the Administrative Law Judge and the order of the University of Tennessee Agricultural and Extension Service issued by its Vice President, W. W. Armistead, on 1 August 1983 wrongfully transferring the plaintiff's job assignment from Madison to Shelby County for one year and unlawfully placing the plaintiff in the unclassified service for one year. Plaintiff herein seeks an order temporarily preserving the status quo until this matter can come on for hearing upon plaintiff's simultaneously filed motion for preliminary injunction. Said order herein requested is one restraining all defendants in the captioned case, their agents, employees and all persons acting in concert or participation with them, pending hearing on preliminary injunction before this Court under Rule 65, Federal Rules of Civil Procedure, as follows:

1. From reassigning and/or further maintaining the reassignment of plaintiff from his position as Associate County Extension Agent for Madison County to an un-

classified position as Extension Agency at large in Shelby County for an entire year as set forth in said agency decision, implemented by defendants;

2. From unlawfully placing and/or further maintaining the plaintiff in the unclassified service or on "probation" for a year and/or from taking any job action against the plaintiff upon the basis of, or as a result of, his unprotected status;

3. From taking any job action whatsoever, including the projected or existing reassignment for a year and the proposed or existing relegation to the unclassified service for a year, against the plaintiff;

4. Requiring the defendants, to the extent that the defendants have already discriminatorily and unlawfully begun to alter the status quo, to immediately restore the plaintiff to the status quo as a full-fledged *classified* employee of defendant and an Associate Extension Agent for Madison County; and

5. Staying completely any and all enforcement of said agency decision.

As grounds for this motion, plaintiff submits the following:

1. On or about 18 December 1981, Dr. M. Lloyd Downen, Mr. Elliott's employer, proposed to discharge Mr. Elliott for alleged inadequate job performance and inadequate job behavior. The employee appealed this proposed discharge. The specific charges, which were made known only by virtue of the Employee's Motion For A More Definite Statement, were in essence, as follows:

(a) Playing golf on duty time from 1976 to 31 July 1981.

(b) Engaging in a commercial cabinet business and other unspecified personal business during working hours.

(c) Making anonymous harassing phone calls to a resident of Gibson County when these alleged calls had nothing whatsoever to do with the Employee's job.

(d) Trespassing charges in another non-work related incident when the Employee vigorously protested a racially inflammatory sign in a business establishment.

(e) For allegedly using profanity against a member of the general public when that person referred to a black 4-H contestant as a "nigger" and stated that he was not going to award this child the prize he deserved; and for the Employee's reporting of this apparent discrimination to the appropriate authorities.

(f) Leaving work early on two specified occasions and on other unspecified occasions.

(g) Charging personal long distance phone calls on the defendants' telephone bill even though the defendants allowed this practice.

(h) For an alleged refusal to follow vague and unclear job instructions.

(i) For an alleged unspecified failure to complete job assignments.

(j) For an alleged use of profanity relating to the exact same incident alleged in Charge (e).

The Hearing Officer sustained Charges (a), (e), (g), and (j) against the Employee and dismissed the others. As a remedy, the A.L.J. recommended that Employee be reassigned for a year during which time he had to prove his competence, etc. at the Employer's discretion.

Further, the A.L.J. rejected the Employee's defense of racial discrimination by virtue of his analysis of the Supreme Court cases of *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and *Texas Department Of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981). The Agency, in a cursory opinion issued on 1 August 1983, rubber stamped the decision of the Administrative Law Judge, wholly adopting said opinion as its own. See Attachment "C".

The defendants have attempted to implement the remedy by transferring him to Shelby County, placing him on probation while at the same time loading him down with extensive and unprecedented responsibilities in an effort to further damage his reputation and standing in West Tennessee as an extension agent and by creating a situation where a satisfactory rating is a virtual impossibility. The remedy placed him almost totally under the exclusive supervision of Luck and Turner, two of the very persons that the plaintiff has alleged in this lawsuit conspired to have him discharged. Turner is one of the persons who testified against him in the Administrative hearing wherein the defendants vigorously prosecuted false charges against the plaintiff in retaliation against him for his efforts to integrate all-white golf courses in Madison County and for the exercise of his First Amendment right to protest racial epithets and signs in public places. Because of said discrimination, the plaintiff is now required to drive over a hundred miles a day from his home. This extensive commuting distance, the newly acquired duties which no other extension agent is required to perform, and the strain occasioned by the job uncertainty of plaintiff having been handed over to the unfettered discretion of defendant Turner and others, all

of which the plaintiff respectfully submits were imposed upon him in an egregious disregard for his rights as secured by the United States Constitution and Federal statute, have reached the point where the plaintiff needs the Court to intervene to protect his physical and emotional health as well as his reputation and professional standing. The defendants should not be allowed to inflict another day of said discriminatory regimen upon the plaintiff until this Court can make a preliminary determination under Rule 65, Federal Rules of Civil Procedure. See Attachment "D".

2. Said decision of the Administrative Law Judge and the agency constituted an abuse of discretion, is contrary to law, and is not supported by reliable, probative, and substantive evidence. Said Administrative Law Judge and agency have demonstrated their unwillingness and/or inability to determine objectively and impartially the constitutional and Federal statutes raised by the plaintiff in his Complaint and therefore, said decision should be stayed until this Court can make a preliminary determination of the likelihood that success on the merits is warranted since only this Court can exercise the Article III powers which are peculiarly applicable to those constitutional and Federal claims.

3. The plaintiff will suffer irreparable harm if the defendants are allowed to involuntarily transfer him to Shelby County and place him on probation for a year since such job action. This case which has been highly publicized in local newspapers, improperly, falsely and discriminatorily implies substandard performance, damages his professional and personal reputation and standing in the community, and, consequently, is likely to impact adversely upon the effectiveness of the service that plain-

tiff can be expected to render in Shelby County or any other County since his job is dependent, in large part, upon the confidence of his competence, character, and professionalism held by the community he serves. The potential for irreparable harm is further highlighted by his current unclassified status wherein the right to a due process hearing does not exist as a buffer against discriminatory and retaliatory job action. These threatened injuries cannot be adequately redressed by money damages.

4. The plaintiff can establish a strong likelihood of success on the merits, and, therefore, is entitled to injunctive relief.

5. The plaintiff should not have to perform the functions of a classified position without the statutorily provided protection. Consequently, the Court should afford the plaintiff this protection by restraining and prohibiting the defendants from placing the plaintiff in the unclassified service or from considering the plaintiff as on any type of "probation" pending a determination by this Court under said Rule 65, FRCP.

6. The defendants have wrongfully and discriminatorily attempted to add subjective stipulations and extrinsic requirements to the remedy ordered by the Administrative Law Judge and the agency and have failed to set forth in writing "a clearly outlined plan for evaluating performance" as required by said remedy, thereby permitting and encouraging further racial discrimination against plaintiff. As a result, the intervention of the Court is necessary to prevent irreparable harm to the plaintiff.

7. The plaintiff already has been disciplined for several of the charges upon which the decision of the Admin-

istrative Law Judge and of the Agency to transfer him and place him in the unclassified service for a year was predicated. Consequently, it is unlawful to again discipline him for these incidents. A stay of the remedy, therefore, is warranted.

8. The discipline proposed against the plaintiff by defendants was a discharge which plaintiff claims to have been the result of unconstitutional and unlawful racial discrimination. The Administrative Law Judge's and Agency's decision and remedy was equally unconstitutional and unlawful in wrongfully rejecting said claims of racial discrimination by plaintiff despite clear evidence thereof, and thereby proposing and effectuating only a "modification" of that proposed discharge into a reassignment and a placement of the plaintiff into the unclassified service or on "probation" for a year. The Court, therefore, should stay the application of the agency remedy to the plaintiff.

A fully incorporated memorandum in support is filed herewith.

**DEFENDANTS' AMENDED MOTION
FOR SUMMARY JUDGMENT**

Filed February 6, 1985

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
JACKSON DIVISION**

(Title Omitted in Printing)

The University of Tennessee defendants' move the court for summary judgment on the additional grounds that the pleadings, together with the final administrative order filed under the Tennessee Uniform Administrative Procedures Act Contested Cases Provisions, T.C.A. §§ 4-5-301, et seq. (filed as Attachment A to plaintiff's motion for a temporary restraining order, a copy of which is attached hereto), demonstrate that there is no genuine issue as to any material fact and that The University of Tennessee defendants are entitled to judgment as a matter of law.

JUDGMENT OF THE DISTRICT COURT

Filed May 8, 1984

**IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
JACKSON DIVISION**

(Title Omitted in Printing)

IT IS ORDERED AND ADJUDGED that in compliance with the Memorandum Decision entered May 2, 1984 in the above-styled case, this case is hereby DISMISSED with prejudice in favor of all defendants.

JAN 24 1986

JOSEPH A. ANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, et al., *Petitioners,*

v.

ROBERT B. ELLIOTT, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 1986

QUESTIONS PRESENTED

1. Whether traditional principles of full faith and credit apply in federal civil rights actions under the Reconstruction statutes to issues fully and fairly litigated before a state agency acting in a judicial capacity.

2. Whether traditional principles of full faith and credit apply in Title VII actions to issues fully and fairly litigated solely at the insistence of the aggrieved employee before a state agency acting in a judicial capacity outside the Title VII enforcement scheme.

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No. 85-588
In the Supreme Court of the United States
OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, et al., *Petitioners*,
v.

ROBERT B. ELLIOTT, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 766 F.2d 982 (6th Cir. 1985). A copy of the slip opinion and the judgment of the Court of Appeals appear in the Appendix to the Petition for Certiorari. (P.A. 1-25; 183-184)¹ The memorandum decision of the United States District Court for the Western District of Tennessee was not reported but appears in the Appendix to the Petition for Certiorari. (P.A. 26-32) The judgment of the District Court appears in the Joint Appendix. (J.A. 32) The final agency order in the contested case hearing under the Tennessee Uniform Administrative Procedures Act appears in the Appendix to the Petition for Certiorari. (P.A. 33-35)

1. References to the Joint Appendix are cited as "J.A." References to items reproduced in the Appendix to the Petition for Certiorari are cited as "P.A."

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 9, 1985. The petition for a writ of certiorari was filed on October 3, 1985, and granted on December 2, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The text of the following constitutional provision and statutes relevant to the determination of this case are set forth in appendices to this brief: U.S. Const. art. IV, § 1; 28 U.S.C. § 1738 (1982); 42 U.S.C. § 2000e-5(b), (c), (d) (1982); Tenn. Code Ann. § 4-5-102(3) (1985); Tenn. Code Ann. §§ 4-5-301 through -323 (1985).

STATEMENT OF THE CASE

This is an action under the Reconstruction civil rights statutes, 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988 (1982), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), in which respondent, Robert B. Elliott, alleges that petitioners² have engaged in racial discrimination against him. Petitioners seek application of issue preclusion in this action on the ground that a

2. Petitioners are all defendants below—The University of Tennessee, The University of Tennessee Institute of Agriculture, The University of Tennessee Agricultural Extension Service, University officials (M. Lloyd Downen, Willis W. Armistead, Edward J. Boling, Haywood W. Luck, and Curtis Shearon), members of the Madison County Agricultural Extension Service Committee (Billy Donnell, Arthur Johnson, Jr., Mrs. Neil Smith, Jimmy Hopper, and Mrs. Robert Cathey), Murray Truck Lines, Inc., Tom Korwin, and Tommy Coley.

prior state adjudication, voluntarily invoked by respondent under the Tennessee Uniform Administrative Procedures Act for the purpose of defending his liberty and property interests under the Due Process Clause of the Fourteenth Amendment, is entitled to full faith and credit in federal court.

A. Respondent's Proposed Termination.

Respondent is employed as an Associate Extension Agent with The University of Tennessee Agricultural Extension Service. During 1981 respondent's superiors observed what in their judgment were instances of inadequate work performance and improper job behavior. Respondent's immediate supervisor and the Dean of the Agricultural Extension Service instituted the University's multi-step disciplinary process in an effort to improve respondent's performance and behavior. These efforts were unsuccessful, however, and instances of inadequate performance and improper behavior continued. (J.A. 21) In December 1981, the University proposed to terminate respondent's employment.³ (J.A. 21-23)

In a letter dated December 18, 1981, the University notified respondent of the disciplinary charges and his right to a due process hearing prior to the proposed termination. (J.A. 21-23) On December 22, 1981, in a written response made by his attorney, respondent demanded a

3. The disciplinary charges included allegations of failure to carry out specific work assignments in a timely and proper manner; insubordination; engaging during University working hours in a personal custom cabinet business; playing golf without permission during working hours; making anonymous harassing phone calls to a private citizen in violation of University work rules; public verbal abuse of private citizens; unexcused absences; and unauthorized use of official University telephone for personal long distance calls. (P.A. 39-43)

formal, trial-type hearing under the contested case provisions of the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 through -323 (1985), to contest the disciplinary charges. Respondent also stated that he intended to prove in the contested case hearing that the University was guilty of racial harassment of him. (Dist. Ct. Nr. 8, Exhibit M to Affidavit of M. Lloyd Downen, filed Feb. 18, 1982)

B. Respondent's District Court Complaint.

On January 5, 1982, before the due process hearing was convened,⁴ and before the EEOC had taken any action on the discrimination charge he had filed in late December 1981, respondent filed this federal court action under the Reconstruction civil rights statutes and Title VII. (J.A. 2-18) Respondent's complaint sought to enjoin the University from taking any employment action against him, one million dollars in damages, and certification of a class action.⁵ (J.A. 17-18)

Respondent's complaint included allegations of racial discrimination against him based on the same incidents out of which the University's disciplinary charges arose. Respondent alleged that these incidents, and the disciplinary charges themselves, were acts of racial discrimination and harassment against him by the University, University officials, and the other petitioners.

On January 19, 1982, the district court entered ex parte a temporary restraining order prohibiting the University from taking any disciplinary action against respondent. (Dist. Ct. Nr. 4) The University responded with a motion

4. The hearing was not convened because of the holiday season.

5. The district court did not certify a class action.

to dissolve the temporary restraining order, to dismiss the complaint, and for summary judgment, asserting that respondent did not meet the prerequisites for preliminary injunctive relief nor the jurisdictional prerequisites for a Title VII action. (J.A. 19-20) The district court, without ruling on the University's motion to dismiss and for summary judgment, dissolved the temporary restraining order, ruling that respondent was not entitled to preliminary injunctive relief. (Dist. Ct. Nr. 12, Feb. 23, 1982)

C. Respondent's Departure From The Available Federal Forums To Invoke The State Due Process Hearing.

Upon dissolution of the temporary restraining order, respondent completely abandoned his Title VII and Reconstruction civil rights claims. Respondent did not seek a Title VII right-to-sue letter at that time or otherwise press his claim within the Title VII enforcement scheme. Nor did he in any way prosecute in federal court his claims under the Reconstruction civil rights statutes. Respondent instead departed entirely from the available federal forums to contest the disciplinary charges in a due process hearing under the Tennessee Uniform Administrative Procedures Act.

The due process hearing convened on April 26, 1982,⁶ well past the time when respondent could have requested a Title VII right-to-sue letter. With various recesses, the hearing continued intermittently until October 1982 for a total of twenty-eight days of testimony and argument. (P.A. 36-37)

6. The hearing was a public hearing held in Jackson, Tennessee (over 300 miles from the University headquarters in Knoxville) for the convenience of respondent and his multitude of witnesses.

In compliance with Tenn. Code Ann. §§ 4-5-301 through -323 (1985), the hearing was conducted with procedural rights which in all respects were identical to those available to civil trial litigants under the Tennessee and Federal Rules of Civil Procedure. These trial-like procedural rights included discovery in accordance with the Tennessee Rules of Civil Procedure; compulsory process to discover and produce documents and witnesses for trial; examination and cross-examination of witnesses; application of rules of evidence; and filing of pleadings, motions, objections, briefs, proposed findings of fact and conclusions of law, and proposed orders. In addition, under the provisions of Tenn. Code Ann. § 4-5-302 (1985), respondent could have petitioned for disqualification of the Administrative Law Judge for "bias, prejudice, interest . . . or for any cause for which a judge may be disqualified."

Respondent did not petition for disqualification of the Administrative Law Judge. Nor did he ever challenge the procedural adequacy or fairness of the state proceedings. To the contrary, he fully availed himself of the trial-like procedural rights provided by the Administrative Procedures Act, as is demonstrated by the voluminous hearing record. The transcript alone consists of 55 volumes, including 159 exhibits⁷ and 5,000 pages of testimony (P.A. 27) from 104 witnesses, 93 of whom were produced by respondent. Over 100 witness and document subpoenas were issued at respondent's request. Respondent's counsel filed briefs, supplemental briefs, and lengthy proposed findings of fact and conclusions of law.

7. The vast majority of exhibits were entered by respondent. Some contained over 100 parts, including photographic prints, slides, and even videotapes displayed in the open hearing.

D. Litigation Of The Issue Of Racial Discrimination As An Affirmative Defense To The Disciplinary Charges.

As the charging party in the due process hearing, the University carried the same burden of persuasion as a plaintiff in a civil trial. The University was required to prove the disciplinary charges by a preponderance of the evidence. Respondent had the right under Tenn. Code Ann. § 4-5-322(h)(1) (1985) to defend the charges on the basis that the agency was acting "[i]n violation of constitutional or statutory provisions." Availing himself of this right, respondent defended on the ground that the charges were racially motivated.

On the first day of the due process hearing, respondent sought to file countercharges of racial discrimination to be tried in the due process hearing. The Administrative Law Judge refused to allow the filing of countercharges, ruling that he was not empowered to dispose of respondent's Reconstruction civil rights or Title VII claims. The Administrative Law Judge further ruled, however, that he was empowered to determine the issue of discrimination as an affirmative defense to the disciplinary charges. (P.A. 44-45, 171)

Respondent fully pursued this affirmative defense and introduced voluminous evidence as to the allegations of individual racial discrimination included in his federal court complaint. Through direct or cross-examination of all 104 witnesses, respondent's counsel sought to establish the discriminatory intent of all parties named as defendants in the federal court complaint with respect to the allegations of individual discrimination alleged in the complaint.

E. Findings Of The Administrative Law Judge.

In a lengthy order including extensive findings of fact and conclusions of law, the Administrative Law Judge found that the University had sustained its burden of persuasion on four charges of improper job behavior.⁸ With respect to the other disciplinary charges, the Administrative Law Judge found that the University either failed to sustain its burden of persuasion or had not provided proper supervision of respondent's work performance. (P.A. 166-170)

The Administrative Law Judge made extensive findings on respondent's affirmative defense that the disciplinary charges were racially motivated. Addressing first the appropriate burden of persuasion with respect to the affirmative defense, the Administrative Law Judge ruled that

[s]ince this is not a civil rights case under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Sec. 2000e, et seq., nor under 42 U.S.C. Sec. 1983, in order to successfully defend [sic] charges of race discrimination, employee must prove by a preponderance of the evidence that the disciplinary actions taken

8. Specifically, the Administrative Law Judge found (1) that respondent was guilty of playing golf without permission during working hours and in violation of University policy; (2) that respondent falsely made written, public accusations that a private livestock judge refused to make judging decisions in favor of black 4-H youths, the contrary facts being publicly available to respondent; and that respondent's public, profane epithets in front of the livestock judge and false accusation "were unjustified and not protected freedom of speech under the constitution, and evidenced traits undesirable in an AES employee"; (3) that respondent's conduct in front of the private livestock judge constituted disorderly conduct and abusive language in violation of University rules; and (4) that respondent made numerous personal long distance calls from a University business phone in violation of University rules. (P.A. 177-178)

against him were because of his race, and that his supervisors only used the charges of improper job behavior and inadequate job performance as a pretext to propose his termination because he is black. Thus, in his defense, Elliott had the same burden of proving pretext as contained in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981).

(P.A. 171)

After a thorough review of the evidence, the Administrative Law Judge made the following ultimate finding on respondent's affirmative defense to the disciplinary charges:

An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing the charges against employee, resulting in these proceedings were based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him.

(P.A. 177)

Despite finding that the University's proposal to terminate respondent was for valid disciplinary reasons and was not racially motivated, the Administrative Law Judge ordered that respondent be given another chance to improve his job behavior. The Administrative Law Judge ordered, therefore, that respondent not be terminated but instead

transferred to the same position in another county under new supervisors. (P.A. 180-181)

F. Appeal Of The Findings To The Agency Head.

Pursuant to Tenn. Code Ann. § 4-5-317 (1985), both respondent and the University petitioned the Administrative Law Judge to reconsider his initial order. The University challenged the decision not to terminate respondent. Respondent, on the other hand, challenged the decision to transfer him and urged once again that the disciplinary charges were racially motivated. The Administrative Law Judge denied both petitions, and respondent then appealed to the Agency Head under the provisions of Tenn. Code Ann. § 4-5-315 (1985). The Agency Head affirmed the findings of the Administrative Law Judge and made the following independent finding on the issue of racial discrimination:

I am also convinced from my review of the record that the action of the Extension Service in proposing the termination of employee's services was not motivated by employee's race but by a desire to terminate employee for what the Extension Service sincerely believed to be inadequate job performance and inadequate job behaviour.

(P.A. 34) The Agency Head also affirmed the Administrative Law Judge's conclusion that respondent be transferred to another county on the ground that the proof "was not sufficient under the circumstances to warrant dismissal." (P.A. 34) Respondent's employment was never interrupted during the state proceedings and continues today.

G. Respondent's Return To Federal Court After The Final Agency Judgment.

Tenn. Code Ann. § 4-5-322 (1985) provides that the only available method of judicial review of a final agency order is by the filing of a petition for review in state chancery court within sixty days of the order. Respondent did not file a timely petition for judicial review. Instead, two months after his transfer had taken place, and eighty-four days after the final agency judgment had been entered, respondent returned to federal district court in late October 1983. (P.A. 29) Eighteen months had passed from the time respondent had departed from the available federal forums to press the issue of racial discrimination in the due process hearing.

Upon returning to the district court, respondent did not seek de novo review of the issue of racial discrimination. Instead, consistent with his earlier departure from the federal forums, respondent filed a motion simply seeking review of the merits of the final agency judgment on the basis of the voluminous record of the state proceedings. (J.A. 24-30) Respondent never filed a Title VII right-to-sue letter in the district court or otherwise requested a de novo review of his Title VII or Reconstruction civil rights claims in the district court.

H. The Decisions Below.

On May 12, 1984, the district court granted summary judgment in favor of all defendants, holding that it lacked jurisdiction to review the merits of the final agency order and that res judicata precluded relitigation of the issue of racial discrimination fully and fairly adjudicated in the due process hearing. (P.A. 26-32)

Respondent appealed to the Court of Appeals for the Sixth Circuit and for the first time contended that he was entitled to de novo review of the issue of racial discrimination under Title VII and the Reconstruction statutes. The Sixth Circuit reversed the district court and held that, in the absence of state court review, no issue adjudicated by a state administrative agency is ever entitled to preclusive effect in a subsequent employment discrimination action under Title VII or the Reconstruction statutes. (P.A. 1-25)

SUMMARY OF ARGUMENT

Although no provision of the Reconstruction civil rights statutes, Title VII, or any other federal law required him to do so, respondent purposefully departed from the available federal forums and fully litigated the issue of racial discrimination in a state agency adjudication conducted for the purpose of protecting his Fourteenth Amendment liberty and property interests. The final agency judgment is entitled to preclusive effect in Tennessee state courts and thus is also entitled, under the full faith and credit clause, U.S. Const. art. IV, § 1, and statute, 28 U.S.C. § 1738 (1982), to preclusive effect in respondent's subsequent federal court action under the Reconstruction statutes and Title VII.

This Court's decisions in *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School District*, 465 U.S. 75 (1984), demonstrate a firm commitment to traditional principles of full faith and credit in civil rights actions and unequivocally establish that the Reconstruction statutes do not repeal the mandate of full faith and credit. Emphatically rejecting the notion that state adjudication of a federal right cannot be trusted, the

Allen and *Migra* decisions clearly articulate the full faith and credit analysis required of federal courts: Whether the prior state adjudication is entitled to preclusive effect in the courts of the state in which it was rendered and, if so, whether the party against whom preclusion is asserted had a full and fair opportunity to litigate in the state forum. The Sixth Circuit failed to apply the full faith and credit analysis prescribed by *Allen* and *Migra* and denied issue preclusion in this case even though the prior adjudication unquestionably is entitled to preclusive effect in Tennessee courts and even though the federal district court itself found that respondent had received full procedural due process in the state proceeding.

Decisions of this Court not only establish that there is no exception to traditional principles of full faith and credit for Reconstruction civil rights actions, but also that there is no exception to the full faith and credit due an adjudication of issues by a state agency acting in a judicial capacity. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Chicago R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926); see also *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 n.26 (1982); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (traditional rules of issue preclusion apply to decisions by agencies acting in a judicial capacity). Indeed, the very purpose of full faith and credit—to place national sanction behind state laws of preclusion—can be accomplished only if the effect of a state judgment, whether rendered by a court or by an agency acting in a judicial capacity, is determined according to the rules of preclusion of the state in which it was rendered.

Distrust of a state agency adjudication is completely unwarranted when the adjudication is provided by state law for the express purpose of protecting an individual's constitutional and statutory rights against arbitrary state action. When the state proceeding, voluntarily invoked, provides all the procedural safeguards of a federal court proceeding, the policy considerations supporting rules of preclusion as well as concerns of comity and federalism demand that federal courts apply full faith and credit to the final agency judgment.

This Court's commitment to traditional principles of full faith and credit extends to Title VII actions as well as actions under the Reconstruction statutes. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court squarely held that Title VII does not expressly repeal the mandate of full faith and credit. This Court also held in *Kremer* that Title VII does not impliedly repeal the full faith and credit due a state court judgment in a subsequent Title VII action.

Full faith and credit is equally mandated with respect to the Title VII action in this case. No provision of Title VII can be construed as an express or implied repeal of the full faith and credit due the final agency judgment in this case. Nothing in Title VII required respondent to invoke the state proceedings or to litigate the issue of racial discrimination there. The only state proceedings which must be invoked under Title VII are those established by state law to remedy employment discrimination. Respondent, however, invoked a state statutory proceeding provided for the protection of his liberty and property interests under the Fourteenth Amendment. No provision of Title VII repeals the full faith and credit owing a state

agency adjudication voluntarily invoked by a state employee outside the Title VII enforcement scheme.

There is no question that the issue of racial discrimination was properly before and wholly within the competence of the state tribunal voluntarily invoked by respondent. Under state law, respondent was entitled to show that the University's proposed termination of his employment would be "[i]n violation of constitutional or statutory provisions." Tenn. Code Ann. § 4-5-322(h)(1) (1985). Respondent in fact defended on the ground that the University's actions were racially motivated, and pursuant to the requirements of state law, voluminous evidence of alleged racial discrimination was admitted in support of respondent's affirmative defense to the disciplinary charges. The fact that the state tribunal was not empowered to determine respondent's Title VII claim in no way detracts from the full faith and credit due the findings made within the conceded competence of the tribunal to adjudicate respondent's affirmative defense. As this Court recently reaffirmed in *Marrese v. American Academy of Orthopaedic Surgeons*, U.S., 105 S. Ct. 1327 (1985), absent an exception to the statutory command of full faith and credit, state law determines the issue preclusion effect of a state judgment even with respect to claims within the exclusive jurisdiction of the federal courts.

There can be no doubt in this case that respondent had every opportunity to and did litigate the issue of racial discrimination fully and fairly in the state proceedings. The state proceedings were conducted in virtually the same manner as a trial in state or federal court. Respondent was represented by counsel at every stage of the proceedings and exercised the full array of procedural

rights available to him under state law. Indeed, respondent has never challenged in any state or federal proceeding below the adequacy or fairness of the procedures under which his due process hearing was conducted. Denial of full faith and credit to the state proceedings in this case would not only undermine the integrity of those proceedings but also needlessly burden the federal court with duplicative litigation. Respondent is fairly bound by his chosen forum's state law that one full and fair opportunity to litigate an issue is enough.

ARGUMENT

I. TRADITIONAL PRINCIPLES OF FULL FAITH AND CREDIT APPLY IN FEDERAL CIVIL RIGHTS ACTIONS UNDER THE RECONSTRUCTION STATUTES TO ISSUES FULLY AND FAIRLY LITIGATED BEFORE A STATE AGENCY ACTING IN A JUDICIAL CAPACITY.

A. This Court Has Consistently Held That Civil Rights Actions Under The Reconstruction Statutes Are Not Categorically Exempt From Traditional Principles Of Full Faith And Credit.

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court endorsed the virtually unanimous view of the courts of appeals that traditional principles of full faith and credit are applicable in civil rights actions under the Reconstruction statutes. If any case presented an especially appealing situation for creating an exception to full faith and credit, it was *Allen*. McCurry, the federal plaintiff in an action under 42 U.S.C. § 1983 (1982), did not select the state

forum; he was, rather, a defendant in a state criminal proceeding. The state's interest in obtaining a conviction was acute—McCurry was not only dealing in heroin, he shot and seriously wounded two undercover police officers who had gone to McCurry's home to attempt a purchase. Moreover, as a result of this Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), McCurry's § 1983 action was his only avenue of access to a federal trial forum for litigation of his federal constitutional claim.

Nonetheless, in *Allen*, this Court squarely held that nothing in the language or legislative history of § 1983 suggests any congressional intent to contravene traditional principles of issue preclusion or to repeal the express statutory requirements of the full faith and credit statute, 28 U.S.C. § 1738 (1982). In so holding, this Court categorically rejected the notion that every person is entitled to one unencumbered opportunity to litigate a federal right in a federal district court:

[N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that *Stone v. Powell* provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so.

449 U.S. at 103-05.

The commitment to traditional principles of full faith and credit in civil rights actions which this Court first expressed in *Allen* was reaffirmed in *Migra v. Warren City School District*, 465 U.S. 75 (1984). In *Migra*, this Court unanimously agreed that a state court judgment is entitled at least to as much claim preclusion effect in a subsequent federal civil rights action under § 1983 as it would have in the courts of the state in which it was rendered. Justice Blackmun, who dissented in *Allen*, delivered the opinion of the Court. He readily acknowledged that the heart of the opinion in *Allen*—namely, that state courts are as obligated and able to uphold federal rights as federal courts—applies with just as much force to claim preclusion as issue preclusion:

It is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments. The argument that state-court judgments should have less preclusive effect in § 1983 suits than in other federal suits is based on Congress' expressed concern over the adequacy of

state courts as protectors of federal rights. . . . *Allen* recognized that the enactment of § 1983 was motivated partially out of such concern, . . . but *Allen* nevertheless held that § 1983 did not open the way to relitigation of an issue that had been determined in a state criminal proceeding. Any distrust of state courts that would justify a limitation on the preclusive effect of state judgments in § 1983 suits would presumably apply equally to issues that actually were decided in a state court as well as to those that could have been. If § 1983 created an exception to the general preclusive effect accorded to state-court judgments, such an exception would seem to require similar treatment of both issue preclusion and claim preclusion. Having rejected in *Allen* the view that state-court judgments have no issue preclusive effect in § 1983 suits, we must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case.

465 U.S. at 83-84.

Thus, *Allen* and *Migra* clearly delineate the relevant analysis with regard to the preclusive effect of a state adjudication in a subsequent federal civil rights action under the Reconstruction statutes. The relevant analysis is unmistakably one of full faith and credit. As this Court emphasized in *Allen*, a departure from traditional principles of full faith and credit can be justified only if plainly intended by Congress. In *Allen* and *Migra*, however, this Court found nothing in the language or legislative history of § 1983 to suggest any congressional intent to contravene traditional principles of preclusion or to repeal the express statutory requirements of the full faith and credit statute.

A prior state adjudication is entitled to preclusive effect in a subsequent federal civil rights action, therefore, as long as the adjudication would preclude relitigation of the claim or issue in the courts of the state in which it was rendered. To this extent, the preclusive effect of a prior state adjudication is defined as a matter of state law. Federal law acts as a restraint only to the extent of ensuring that the state proceedings afford the party against whom preclusion is asserted a full and fair opportunity to litigate. See *Allen*, 449 U.S. 90, 95 (1980).

Although ignored by the Sixth Circuit, the full faith and credit analysis prescribed by this Court in *Allen* and *Migra* requires that respondent be precluded from relitigating the issue of racial discrimination in his federal court action under the Reconstruction civil rights statutes. First, Tennessee law provides that an adjudication by a state agency acting in a judicial capacity is entitled to preclusive effect in Tennessee courts. See *Polsky v. Atkins*, 197 Tenn. 201, 270 S.W.2d 497 (1954); *Fourakre v. Perry*, 667 S.W.2d 483 (Tenn. App. 1983); *Purcell Enterprises, Inc. v. State*, 631 S.W.2d 401 (Tenn. App. 1981). Second, there can be no doubt that respondent was afforded a full and fair opportunity to litigate the issue of racial discrimination. Respondent's due process hearing was conducted with complete trial rights including discovery, witness and document subpoenas, representation by counsel, examination and cross-examination of witnesses, and filing of pleadings, motions, objections, briefs, proposed findings of fact and conclusions of law, and proposed orders. The transcript portion of the hearing record alone is voluminous—55 volumes with over 5,000 pages of testimony from 104 witnesses, not to mention 159 exhibits. Respondent called ninety-three witnesses. The issue of discrimination hardly could have been litigated more fully in either state

or federal court. In fact, the district court made the following specific finding concerning respondent's full and fair opportunity to litigate in the due process hearing:

Plaintiff makes no claim of denial of procedural due process. Nor can he in light of the long exhaustive evidentiary hearing in which plaintiff presented more than ninety witnesses, and cross-examined some of the agency's witnesses for more than thirty hours each. Plaintiff clearly has received full protection in this due process hearing, as required in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972).

(P.A. 31)

Indeed, this case unquestionably presents the most appealing circumstance of all for applying traditional principles of full faith and credit in a civil rights action under the Reconstruction statutes. As a result of this Court's opinion in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies not required in actions under § 1983), the decision to litigate the charge of racial discrimination in the state proceeding rested solely with respondent. Although respondent could have avoided any state action on his Reconstruction civil rights claim simply by litigating it in federal court in the first place, he deliberately and voluntarily invoked the state forum and vigorously litigated the issue of racial discrimination there as an affirmative defense to his proposed termination. In a searching review of the evidence revealed in lengthy findings of fact, the Administrative Law Judge found, however, that respondent's proposed termination was for valid disciplinary reasons and was not racially motivated. This finding was affirmed on appeal to the Agency Head. Judicial

review of the adverse finding was available, but respondent did not avail himself of the opportunity.

The findings of the state agency adjudication in this case are entitled to preclusive effect in Tennessee courts under Tennessee rules of preclusion. Respondent should not be permitted now to flout state law and litigate the issues yet again in a federal forum. To do so would contravene all of the policy considerations justifying traditional principles of preclusion and their adoption as national policy through principles of full faith and credit.

B. Traditional Principles Of Full Faith And Credit Apply To The Final Judgment Of A State Agency Acting In A Judicial Capacity.

1. This Court Has Never Recognized An Artificial Distinction Between State Agency Adjudications And State Court Adjudications For Full Faith And Credit Purposes.

This Court has never deviated from the principle that state agency adjudications are entitled to the same issue preclusion effect in other courts as they enjoy in the courts of the rendering jurisdiction. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Chicago R.I. & P. Ry. v. Schenck*, 270 U.S. 611 (1926). Justice Stevens' statement on behalf of the plurality in *Thomas* could hardly have been more explicit: "To be sure, . . . the factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court." 448 U.S. at 281. In the concurring and dissenting opinions in *Thomas*, not a single member of this Court expressed any disagreement with this statement of well-established law. The Sixth Circuit's ruling that full faith and credit

"does not require federal courts to defer to the unreviewed findings of state administrative agencies," *Elliott v. University of Tennessee*, 766 F.2d 982, 990 (6th Cir. 1985), is simply a refusal to recognize what this Court has already recognized for at least six decades.⁹

Both the full faith and credit clause of the Constitution, article IV, § 1, and the federal full faith and credit statute, 28 U.S.C. § 1738 (1982), require that state "[a]cts, records and judicial proceedings" be given the same full faith and credit as they enjoy in the courts of the rendering state. As this Court stressed in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943),

[w]hether the proceeding before . . . [a state agency acting in a judicial capacity is] regarded as a "judicial proceeding", or its award is a "record" within the meaning of the full faith and credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have "such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Id. at 443.

Under this nation's federal scheme of government, a state is free to exercise its judicial power through its courts or, if it sees fit, through its executive and adminis-

9. The decision of the Sixth Circuit refusing to give full faith and credit to the state agency adjudication is inconsistent with the weight of post-*Allen* lower court authority. See *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42 (2d Cir. 1985); *Steffen v. Housewright*, 665 F.2d 245 (8th Cir. 1981); *Snow v. Nevada Dep't of Prisons*, 543 F. Supp. 752 (D. Nev. 1982); *O'Connor v. Mazzullo*, 536 F. Supp. 641 (S.D.N.Y. 1982); *Gear v. City of Des Moines*, 514 F. Supp. 1218 (S.D. Iowa 1981). But see *Moore v. Bonner*, 695 F.2d 799 (4th Cir. 1982).

trative agencies. The judgments of such agencies, acting judicially, are entitled to the same preclusive effect as they enjoy in the state's courts because the proceedings are in fact "judicial proceedings" of the state within the meaning of the full faith and credit clause and statute. The very purpose of the full faith and credit clause and statute is to put national sanction behind state policies with respect to the effect of a judgment. See *Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942). That purpose can be fully realized only if the force and effect of a judgment, whether rendered by a court or by a state agency acting in a judicial capacity, is determined according to the law of the state of rendition. The decision of the Sixth Circuit denies full faith and credit to the very decisions of Tennessee courts holding that state agency adjudications are entitled to preclusive effect in Tennessee courts.

The State of Tennessee has empowered its agencies to act in a judicial capacity to adjudicate contested cases in which a person's legal rights are required by constitutional or statutory provision to be determined prior to proposed agency action. See *Tenn. Code Ann.* § 4-5-102(3) (1985). The Sixth Circuit concluded, however, that "state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court." *Elliott*, 766 F.2d at 992. There is no support for this conclusion in decisions of this Court. *Allen* and *Migra* unequivocally laid to rest any notion that every person is entitled to one unencumbered opportunity to litigate a federal right in federal court "regardless of the legal posture in which the federal claim arises." *Allen*, 449 U.S. at 103.

Indeed, *Allen* and *Migra* are vivid illustrations of this Court's confidence in the ability of the states to vindicate

federal rights. When, as here, an agency adjudication is provided by state law for the express purpose of protecting an individual's constitutional and statutory rights prior to agency action, there is absolutely no reason to distrust the adjudication. Moreover, according full faith and credit to the state agency adjudication in this case in no way undermines full access to federal court. The decision to litigate the issue of racial discrimination in the state proceeding rested solely with respondent. If respondent wanted full access to federal court, it was his for the taking.

This Court has recognized previously that principles of issue preclusion apply to adjudications by agencies using procedural formalities approximating those of courts. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), this Court explicitly rejected the notion that principles of issue preclusion do not apply to agency adjudications:

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

384 U.S. at 422. Applying this principle to the facts of *Utah*, this Court concluded:

[T]he Board was acting in a judicial capacity . . . the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.

Id. This Court's recognition that principles of issue preclusion are applicable to agency adjudications has been extensively followed in the courts of appeals¹⁰ and was noted recently by this Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 n.26 (1982).

In this case, petitioners seek application of issue preclusion¹¹ to bar respondent's attempt to relitigate

10. See, e.g., *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969); *Delamater v. Schweiker*, 721 F.2d 50 (2d Cir. 1983); *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *Pettus v. American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), cert. denied, 444 U.S. 883 (1979); *Painters Dist. Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969); *International Wire v. Local 38, IBEW*, 357 F. Supp. 1018 (N.D. Ohio 1972), aff'd, 475 F.2d 1078 (6th Cir.), cert. denied, 414 U.S. 867 (1973); *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978); *United States v. Karlen*, 645 F.2d 635 (8th Cir. 1981); *United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249 (9th Cir. 1982); *McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910 (10th Cir. 1976).

Of particular significance here is the holding of the Ninth Circuit in the *United Farm Workers* case that state agency adjudications are entitled to full faith and credit in other states:

It is settled that if an administrative agency acts in a judicial capacity, its judgments are entitled to recognition and enforcement pursuant to the full faith and credit clause. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-1560, 16 L.Ed.2d 642 (1966). . . . The ultimate question in full faith and credit analysis is one of *res judicata*. Thus, decisions of the courts or administrative agencies of one state are entitled to the same *res judicata* effect in all other states as they enjoy in the state of rendition.

669 F.2d at 1255.

11. In *Migra v. Warren City School District*, 465 U.S. 75 (1983), this Court defined the terms "issue preclusion" and "claim preclusion" as follows:

Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. . . . This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect

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the very same issues fully and fairly litigated before a state agency acting in a judicial capacity and with the same procedural formalities as a federal or state court. The fact that the Administrative Law Judge in this case was not empowered to dispose of respondent's claims under the Reconstruction statutes in no way bars application of full faith and credit to the issues actually litigated and decided in the state proceeding. See *Marrese v. American Academy of Orthopaedic Surgeons*, U.S., 105 S.Ct. 1327 (1985). The due process hearing conducted in this case was unquestionably a judicial proceeding of the State of Tennessee. The final agency judgment with respect to issues actually litigated in the proceeding is entitled, therefore, to the same full faith and credit which it enjoys in Tennessee courts.

2. Denial Of Full Faith And Credit To The Final Agency Judgment In This Case Would Seriously Undermine The Integrity Of State Agency Adjudications Conducted For The Purpose Of Protecting Fourteenth Amendment Due Process Interests.

During the past fifty years, administrative agencies at both the federal and state level have become essen-

Footnote continued—

of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

Id. at 77 n.1.

Petitioners seek issue preclusion—not claim preclusion—in this case and seek such preclusion without regard to which party prevails in the prior adjudication. If, for example, respondent had prevailed on the issue of racial discrimination, petitioners maintain that the adjudication would bar petitioners from relitigating that issue in a subsequent federal court action under the Reconstruction statutes.

tially a fourth branch of government without which the legislative, executive, and judicial branches could not function adequately. In particular, the adjudicatory role of administrative agencies has increased dramatically. As Justice Jackson once stated: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

A significant increase in state agency adjudications in recent years is particularly pronounced in the area of public employment. In *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972), this Court ruled that "[w]hen protected . . . [Fourteenth Amendment] interests are implicated, the right to some kind of prior hearing is paramount." Thus, any proposed action by state agencies which threatens or even potentially threatens an employee's constitutionally protected liberty and property interests triggers the requirement of an adjudication to protect those interests. In Tennessee and thirty-one other jurisdictions which have adopted the Uniform Law Commissioners' Model Administrative Procedures Act,¹² an em-

12. See Ala. Code § 41-22-12 *et seq.* (1982); Ark. Stat. Ann. § 5-709 (1976); Conn. Gen. Stat. Ann. § 4-177 (West Supp. 1985); Del. Code Ann. tit. 29, § 10121 *et seq.* (1983); D.C. Code Ann. § 1-1509 (1981); Fla. Stat. Ann. § 120-57 (West 1982); Ga. Code Ann. § 50-13-13 (1981); Hawaii Rev. Stat. § 91-9 (1976); Idaho Code § 67-5209 (1980); Ill. Rev. Stat. ch. 27, § 1010 (1981); Iowa Code Ann. § 17A.12 (West 1978); La. Rev. Stat. Ann. § 49:955 (West Supp. 1985); Me. Rev. Stat. Ann. tit. 5, § 9051 *et seq.* (1979); Md. State Gov't Code Ann. § 10-201 *et seq.* (1984); Mich. Comp. Laws Ann. § 24-24.271 *et seq.* (1981); Mo. Ann. Stat. § 536.070 (Vernon Supp. 1985); Mont. Code Ann. § 2-4-601 *et seq.* (1979); Neb. Rev. Stat. § 84-913 *et seq.* (1981); Nev. Rev. Stat. § 233B.121 *et seq.* (1981); N.H. Rev. Stat. Ann. § 541-A:16 (Supp. 1985); N.Y. Administrative Procedure Act

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ployee is entitled to an adjudication virtually identical to a civil trial in state or federal court. See Tenn. Code Ann. §§ 4-5-301 through -323 (1985). Virtually every judgment resulting from these formal adjudications could be the subject of a collateral attack in federal court. When an employee chooses, as respondent did in this case, to invoke the trial-like proceedings of a state agency adjudication to defend his liberty and property interests, the issues fully litigated and decided there must be afforded full faith and credit in federal courts in order to preserve the integrity of the state adjudicatory process. Denial of full faith and credit to the final state agency judgment would render the process futile and seriously undermine the role of state agency adjudication in resolving disputes between public employers and employees.

The policies justifying preclusion—judicial economy, reliance on adjudication, avoiding inconsistent results, relieving the parties of the cost and vexation of multiple litigation—as well as the policies of comity and federalism supporting full faith and credit, are equally applicable to agency adjudications and court adjudications. See generally K. Davis, *Administrative Law Treatise* § 21:2 (1983); Restatement (Second) of Judgments § 83 (1982). In this particular case, these policy considerations are acutely implicated in view of respondent's voluntary submission of the issue of racial discrimination for adjudication in the state agency, the protracted and costly nature

Footnote continued—

§ 301 *et seq.* (McKinney 1984); N.C. Gen. Stat. § 150A-23 *et seq.* (1983); Okla. Stat. Ann. tit. 75, § 310 (West 1976); Or. Rev. Stat. § 183.413 *et seq.* (1985); R.I. Gen. Laws § 42-35-9 (1984); S.D. Comp. Laws Ann. § 1-26-16 *et seq.* (1980); Vt. Stat. Ann. tit. 3, § 809 (1972); Wash. Rev. Code Ann. § 34.04.090 *et seq.* (1965); W.Va. Code § 29A-5-1 *et seq.* (1980); Wis. Stat. Ann. § 227.07 (West 1982); Wyo. Stat. § 16-3-107 (1982).

of the adjudication, and the state's interest in preserving the integrity of its contested case adjudications. As this Court stated in *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931):

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

The public policies embodied in traditional principles of full faith and credit dictate that this litigation come to an end and that respondent be precluded from relitigating issues he voluntarily submitted for full adjudication in the state agency.¹³

13. According full faith and credit to state agency adjudications in subsequent civil rights actions under the Reconstruction statutes is in no way dependent upon resolution of the Title VII question also presented in this case. The contrary opinion of the Sixth Circuit completely ignores this Court's repeated admonitions that the Reconstruction statutes and Title VII provide separate, distinct, and independent avenues of relief for alleged employment discrimination. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The Reconstruction statutes and Title VII differ markedly in terms of coverage, preconditions to a federal court action, applicable limitations period, and relief available upon proof of a violation. See generally 2 J. Cook & J. Sobieski, *Civil Rights Actions* ¶¶ 4.09, 5.04, 7.04 (1987). Moreover, the Reconstruction statutes are certainly not restricted to claims of alleged employment discrimination. Yet, only in the area of employment discrimination can any argument be made for identical full faith and credit treatment under the Reconstruction statutes and Title

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II. TRADITIONAL PRINCIPLES OF FULL FAITH AND CREDIT APPLY IN TITLE VII ACTIONS TO ISSUES FULLY AND FAIRLY LITIGATED SOLELY AT THE INSISTENCE OF THE AGGRIEVED EMPLOYEE BEFORE A STATE AGENCY ACTING IN A JUDICIAL CAPACITY OUTSIDE THE TITLE VII ENFORCEMENT SCHEME.

A. Title VII Actions Are Not Categorically Exempt From Traditional Principles Of Full Faith And Credit.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court held that traditional principles of full faith and credit apply to state court judgments in subsequent Title VII actions. After a careful review of the language and legislative history of Title VII, this Court expressly rejected the notion that Congress intended to create an absolute right to relitigate in federal court issues resolved by a state court. On the contrary, finding that Congress did not intend that Title VII supersede the principles of comity and repose embodied in the full faith and credit statute, this Court concluded that full faith and credit applies to a state court judgment affirming, without de novo review, the findings of a Title VII state deferral agency.

Footnote continued—

VII. To do so would lead to the anomalous result that different claims arising under the Reconstruction statutes—conceivably involving the very same factual context—would be subject to radically different preclusion effect, notwithstanding the absence of any indication in the Reconstruction statutes that such a distinction should be made. *Id.* at ¶ 5.04.

B. No Provision Of Title VII Required Respondent To Litigate The Issue Of Racial Discrimination In The State Agency Proceeding; Nor Does Any Provision Of Title VII Specify The Effect Of The Final Agency Judgment.

A principal teaching of this Court's decision in *Kremer*, as well as *Allen* and *Migra*, is that an exception to full faith and credit "will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468. Because there can be no claim that Title VII expressly repeals the full faith and credit statute, any repeal must be implied. As stressed in *Allen*, *Migra*, and *Kremer*, however, repeals by implication are not favored. See *Kremer*, 456 U.S. at 468. Indeed, in *Kremer* this Court recognized only two well-established categories of repeal by implication: (1) where the provisions of two acts are in irreconcilable conflict; and (2) where a later act covers the entire subject of an earlier one and clearly is intended as a substitute. See *id.*

Considering the relationship between Title VII and the full faith and credit statute with respect to a state court judgment, this Court emphasized in *Kremer* that "[n]o provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the Act specify the weight a federal court should afford a final judgment by a state court if such a remedy is sought." *Kremer*, 453 U.S. at 469. Finding no clear and manifest incompatibility, therefore, between Title VII and the full faith and credit statute, this Court concluded that nothing in the language or operation of Title VII impliedly repeals the statutory mandate of full faith and credit.

This case presents an even more compelling circumstance than *Kremer* for finding no repeal by implication of the statutory command of full faith and credit. Nothing in Title VII obligated respondent to litigate the issue of racial discrimination in the state forum. Respondent did not invoke the state proceedings pursuant to a state antidiscrimination law.¹⁴ Rather, exercising his right as a public employee to defend his liberty and property interests under the Fourteenth Amendment, respondent invoked a due process hearing under the Tennessee Uniform Administrative Procedures Act to challenge his proposed termination. Once invoked, the Act required the University to afford respondent a formal, trial-like hearing. Respondent fully litigated the issue of racial discrimination in the due process hearing as an affirmative defense to the disciplinary charges against him. Respondent thus made a critical choice to litigate the issue of racial discrimination outside the Title VII enforcement scheme. Nothing in Title VII or any other provision of law required him to do so.

Moreover, nothing in Title VII purports to specify the effect a federal court should afford the final agency judgment in this case. Title VII only specifies that the EEOC must afford "substantial weight" to the findings of state agencies which are charged with the enforcement

14. Title VII requires deferral only to those state agencies which by state law are empowered "to grant or seek relief from" the alleged unlawful employment practice. See 42 U.S.C. § 2000e-5(c), (d) (1982). In Tennessee, the required deferral agency is the Tennessee Human Rights Commission, which is authorized by the provisions of Tenn. Code Ann. § 4-21-202 (1985) to enforce the state's law against employment discrimination.

of state antidiscrimination laws.¹⁵ This provision could be construed, therefore, as an implied repeal of the full faith and credit statute only as it applies to determinations by Title VII deferral agencies. See *Kremer*, 456 U.S. at 470 n.7. No provision of Title VII prescribes the effect of a state agency adjudication voluntarily invoked by an aggrieved employee outside the Title VII enforcement scheme, and thus nothing in Title VII can be construed as an implied repeal of the full faith and credit due such an adjudication.

As established earlier with respect to respondent's action under the Reconstruction statutes, see pp. 22 to 30 *supra*, full faith and credit applies to prior state judicial proceedings whether conducted by a state court or by a state agency acting in a judicial capacity. This Court's decision in *Kremer* unquestionably establishes that federal courts must apply full faith and credit principles in Title VII actions unless Title VII itself impliedly repeals the statutory command. Because nothing in Title VII required respondent to invoke the state proceeding conducted in this case or to litigate the issue of racial discrimination there, and because nothing in Title VII specifies the effect of the resulting judgment, nothing in the language or operation of Title VII can in any way be viewed in this case as an express or implied repeal of the statutory mandate of full faith and credit. Nothing

15. The provision of Title VII requiring the EEOC to give "substantial weight" to findings made in state proceedings applies only to those state proceedings which Title VII itself requires to be pursued. See 42 U.S.C. § 2000e-5(b) (1982) ("[T]he Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section [emphasis added].")

more needs to be decided to hold that full faith and credit applies to the final agency judgment in this particular case.¹⁶

C. Full Faith And Credit Applies To Issues Properly Before And Fully And Fairly Adjudicated By A State Agency Acting In A Judicial Capacity.

The fact that respondent litigated the issue of racial discrimination in a state forum without jurisdiction to resolve respondent's Title VII claim does not bar application of issue preclusion in this case. There is no question that the issue of racial discrimination was properly before and wholly within the competence of the state tribunal. Under governing state law, the University was

16. Most of the post-*Kremer* lower court decisions on the preclusive effect of a judicially unreviewed agency adjudication arise within the Title VII enforcement scheme and thus involve state deferral agencies. Compare, e.g., *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842 (7th Cir. 1985), petition for cert. filed, U.S.L.W. (U.S. Dec. 23, 1985) (No. 85-6094) (preclusive effect); and *Parker v. National Corp. for Housing Partnerships*, 619 F. Supp. 1061 (D.D.C. 1985) (same); with *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir. 1985) (no preclusive effect); *Reedy v. Florida*, 605 F. Supp. 172 (N.D. Fla. 1985) (same); and *Jones v. Progress Lighting Corp.*, 595 F. Supp. 1031 (E.D. Pa. 1984) (same).

In the few post-*Kremer* decisions on the preclusive effect of a judicially unreviewed agency adjudication outside the Title VII enforcement scheme, the issue of employment discrimination apparently was not litigated in the prior adjudication—either because the employee chose not to raise it there or because it could not be properly raised there. Compare *O'Hara v. Board of Education*, 590 F. Supp. 696 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985) (preclusive effect); with *Heath v. John Morrell & Co.*, 78 F.2d 245, 7th Cir. 1985) (no preclusive effect); and *Snow v. Nevada Dep't of Prisons*, 543 F. Supp. 752 (D. Nev. 1982) (same). In this case, respondent chose to litigate the issue of racial discrimination fully in the due process hearing, and the issue was properly before the tribunal as respondent's affirmative defense to the disciplinary charges against him.

obligated to prove its disciplinary charges against the respondent by a preponderance of the evidence. Respondent, on the other hand, was entitled to defend against the disciplinary charges by showing that the University acted "[i]n violation of constitutional or statutory provisions." Tenn. Code Ann. § 4-5-322(h)(1) (1985). Respondent in fact chose to defend on the ground that the disciplinary charges were racially motivated, and pursuant to the requirements of state law, the Administrative Law Judge admitted evidence on the issue of discrimination as an affirmative defense to the disciplinary charges against respondent. In adjudicating the issue of racial discrimination, therefore, the Administrative Law Judge was undeniably acting within the scope of his conceded competence to determine respondent's affirmative defense even though he could not determine respondent's Title VII and Reconstruction civil rights claims.

As this Court strikingly reaffirmed in its recent decision in *Marrese v. American Academy of Orthopaedic Surgeons*, U.S., 105 S. Ct. 1327 (1985), absent an exception to the full faith and credit statute, state law determines the issue preclusion effect of a prior state judgment in a subsequent action even if it involves a claim within the exclusive jurisdiction of the federal courts. *Marrese* concerned a federal antitrust action commenced after the dismissal of a prior state court action. The court of appeals ruled as a matter of federal law that dismissal of the state court action barred the subsequent federal antitrust action. This Court held, however, that the full faith and credit statute requires the preclusive effect of a state judgment to be decided according to the law of the state in which the judgment was rendered. Significantly, this Court readily recognized that *Kremer* itself

implies that "absent an exception to § 1738, state law determines at least the issue preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts." *Marrese*, U.S. at, 105 S. Ct. at 1332. Although expressly declining to decide in *Kremer* whether subject matter jurisdiction of Title VII claims is exclusive to the federal courts, see *Kremer*, 456 U.S. at 480 n.20, this Court held that full faith and credit required dismissal of *Kremer's* Title VII action because the issue of employment discrimination had been fully and fairly litigated in the state proceedings. Even if claim preclusion did not apply, therefore, issue preclusion required dismissal of the Title VII action. See *id.* at 481 n.22.

The issue of racial discrimination was fully and fairly litigated in this case before a tribunal fully competent to adjudicate the issue as an affirmative defense to the proposed agency action. Because there is no exception to the full faith and credit statute for a state agency adjudication outside the Title VII enforcement scheme, state law is determinative of the issue preclusion effect of the adjudication in this case and precludes respondent from litigating the issue of racial discrimination yet again in a federal forum.¹⁷

17. Petitioners seek only issue preclusion to bar respondent from relitigating issues actually litigated before the agency. Petitioners do not seek claim preclusion. Therefore, if the tribunal had found that respondent's proposed termination was racially motivated, respondent would not be barred from seeking supplemental relief in a Title VII action. Cf. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (employee who prevailed before state deferral agency entitled to bring Title VII action for supplemental relief). Petitioners would be barred, however, from relitigating the issue of the reason for respondent's proposed termination.

D. The Issue Of Racial Discrimination Was Fully And Fairly Litigated In The State Proceeding.

Although full faith and credit applies to a state agency adjudication outside the Title VII enforcement scheme, a federal court must be satisfied that the party against whom issue preclusion is sought had a full and fair opportunity to litigate in the state forum. In *Kremer*, however, this Court held that "where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." 456 U.S. at 481. This Court found in *Kremer* that the issue of employment discrimination had been litigated fully and fairly in the state forum and that the aggrieved employee was not entitled to litigate it again in a federal forum. The facts of this case, even more than those of *Kremer*, demand the finding that a full and fair litigation occurred in the state forum and that issue preclusion prohibits respondent from relitigating the issue of racial discrimination in federal court.

In *Kremer*, the aggrieved employee's charge of employment discrimination was referred by the EEOC to the New York state agency charged with enforcing that state's antidiscrimination laws. The agency conducted a probable cause investigation of the employee's charge but never conducted an adversarial hearing in a procedural setting even approximating that of a state or federal court. The result of the agency's investigation was a finding of no probable cause to believe the charge was true. After an unsuccessful administrative appeal, the employee filed a petition in state court to set aside the adverse agency finding. The state court decided, however, that the agency

finding was not arbitrary or capricious and, on that basis, affirmed the finding without de novo review. This Court in turn held that the state court judgment affirming the agency finding was entitled to the same preclusive effect it enjoyed in the New York state courts, even though it was rendered after limited judicial review. Thus, while the agency proceedings in *Kremer* fell far short of the formality of a state or federal court action, the agency finding of no probable cause precluded relitigation of the issue of employment discrimination because the agency's investigation, coupled with limited judicial review, satisfied the minimum due process necessary for full faith and credit to apply. See *Kremer*, 456 U.S. at 484-485 & n.26.

The agency proceedings in this case were far more extensive and formal than those in *Kremer*. The proceedings here were conducted in virtually the same manner as a trial in state or federal court. Respondent was represented by counsel throughout the proceedings and fully exercised the array of procedural rights available to him under the Tennessee Uniform Administrative Procedures Act—discovery, compulsory process, examination and cross-examination of witnesses, and filing of pleadings, briefs, and proposed findings of fact and conclusions of law. Indeed, respondent has never challenged the adequacy or fairness of the procedures under which the hearing was conducted, nor did he exercise his statutory right to seek judicial review of the adverse agency finding. Judicial review would have added nothing to the full and fair litigation respondent enjoyed in the agency adjudication.

Beyond the fullness and fairness of the procedural protections themselves, respondent unquestionably had a full and fair opportunity to litigate the issue of racial

discrimination. Through his counsel, a prominent civil rights attorney in Tennessee, respondent fully litigated the issue as respondent's primary, if not sole, defense to the disciplinary charges. Respondent's counsel questioned each of the 104 witnesses, 93 of whom were called by respondent, concerning all the alleged incidents of racial discrimination by all the petitioners.¹⁸ In particular, respondent's counsel cross-examined the Dean of the Agricultural Extension Service and respondent's immediate supervisor for more than thirty hours each concerning the incidents from which the disciplinary charges arose and any racial motivation for the charges.

The allegations of racial discrimination which respondent fully litigated in the agency adjudication mirrored the allegations of individual discrimination in his federal court complaint. The reason is clear. The purpose of respondent's federal court complaint was to enjoin the University from taking any employment action against him on the basis of the incidents underlying the disciplinary charges. Unlike a private employee, however, respondent had the opportunity to prevent the proposed employment action by exercising his due process right as a public employee to challenge the reasons for his proposed termination. Respondent's incentive to litigate the issue of racial discrimination in the due process hearing was clearly as great, therefore, as it would have been in a Title VII action.

The Administrative Law Judge concluded that respondent's burden in proving his affirmative defense of racial

18. Most of the petitioners testified in the hearing. Respondent subpoenaed all of the petitioners but chose not to call some of them.

discrimination was the same as a Title VII claimant's burden of proving pretext under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (P.A. 171) The University's burden, on the other hand, was to prove the disciplinary charges by a preponderance of the evidence. The Administrative Law Judge found that the University had satisfied that burden as to four of the disciplinary charges. (P.A. 166-170) The University carried a greater burden, therefore, than the employer in a Title VII action, who under *Burdine* and *McDonnell Douglas* merely must articulate a legitimate non-discriminatory reason for the employment action and never bears the burden of persuasion. Thus, while respondent's burden in the contested case hearing was no greater than in a Title VII action, the University's burden was far greater.

The state agency adjudication in this case offered respondent the same procedural formalities within which to litigate the issue of racial discrimination as a federal court and far greater formalities than an EEOC or state deferral agency probable cause investigation. Failure to apply issue preclusion in this case would allow respondent two chances to litigate the issue of racial discrimination in a formal judicial proceeding. Denial of preclusive effect to the final agency judgment in this case, therefore, would not only undermine the integrity of the adjudicatory process which the State of Tennessee has provided for the purpose of protecting Fourteenth Amendment interests affected by agency action, but also burden the federal court with needlessly relitigating an issue already litigated fully and at great expense to the State of Tennessee. All of the policy considerations underlying rules of preclusion and embodied in full faith and credit—ju-

dicial economy, reliance on adjudication, avoiding inconsistent results, relieving the parties of the cost and vexation of multiple litigation, comity and federalism—dictate that the final agency judgment in this case be given issue preclusion effect in respondent's Title VII action.

Having purposefully departed from the Title VII enforcement scheme and having freely chosen the state agency adjudication as the forum in which to litigate the issue of racial discrimination, respondent is fairly bound by the law of Tennessee which holds that one full and fair opportunity to litigate an issue is enough. Because issues decided by the state agency acting in a judicial capacity cannot be relitigated under the law of Tennessee, those issues cannot be relitigated in a federal court. Traditional principles of full faith and credit require reversal of the Sixth Circuit's judgment completely disregarding Tennessee rules of preclusion in this case.

CONCLUSION

For the reasons stated, the judgment and opinion of the Court of Appeals for the Sixth Circuit should be reversed and the final agency judgment in this case given issue preclusion effect in respondent's federal court action under the Reconstruction civil rights statutes and Title VII.

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APPENDIX

APPENDIX A

Constitutional Provision

J.S. Const. art. IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

APPENDIX B

Federal Statutes

28 U.S.C. § 1738 (1982)

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 2000e-5 (b), (c), (d) (1982)

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of

the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as

promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision

of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

APPENDIX C

State Statutes

Tenn. Code Ann. § 4-5-102(3) (1985)

"Contested case" means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing. Such proceeding may include rate making; price fixing; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; the grant or denial of licenses, permits or franchises where the licensing board is not required to grant the license, permit or franchise upon the payment of a fee or the finding of certain clearly defined criteria; and suspensions of, revocations of, and refusals to renew licenses. An agency may commence a contested case at any time with respect to a matter within the agency's jurisdiction;

Tenn. Code Ann. §§ 4-5-301 through -323 (1985)

4-5-301. Conduct of contested cases.—(a) In the hearing of any contested case, the proceedings or any part thereof:

(1) Shall be conducted in the presence of the requisite number of members of the agency as prescribed by law and in the presence of an administrative judge or hearing officer; or

(2) Shall be conducted by an administrative judge or hearing officer sitting alone.

(b) It shall be the duty of the administrative judge or hearing officer to preside at the hearing, rule on questions of the admissibility of evidence, swear witnesses, advise the agency members as to the law of the case, and insure that the proceedings are carried out in accordance with the provisions of this chapter, other applicable law and the rules of the respective agency. Provided, however, at no time shall the administrative judge or hearing officer hearing a case with agency members under subsection (a) take part in the determination of a question of fact unless the administrative judge or hearing officer is an agency member. An administrative judge or hearing officer shall, upon his own motion, or timely motion of a party, decide any procedural question of law.

(c) The agency shall determine whether a contested case shall be conducted by an administrative judge or hearing officer sitting alone or in the presence of members of the agency; provided, however, that administrative judges or hearing officers employed in the office of the secretary of state shall not be required to conduct a contested case sitting alone in the absence of agreement between the agency and the secretary of state.

(d) Contested cases under this section may be conducted by administrative judges or hearing officers employed in the office of the secretary of state upon the request of the agency being presented to the secretary of state and the request being granted.

(e) Any agency not authorized by law to have a contested case conducted by an administrative judge, hearing officer or similar officer from the agency shall direct that the proceedings or any part thereof be

conducted by an administrative judge or hearing officer employed in the office of the secretary of state. [Acts 1982, ch. 874, § 37; 1984, ch. 728, § 11.]

4-5-302. Disqualification of judge, hearing officer, etc.—Substitutions.—(a) Any administrative judge, hearing officer, or agency member shall be subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for any cause for which a judge may be disqualified.

(b) Any party may petition for the disqualification of an administrative judge, hearing officer or agency member promptly after receipt of notice indicating that the individual will serve or, if later, promptly upon discovering facts establishing grounds for disqualification.

(c) A party petitioning for the disqualification of an agency member shall not be allowed to question the agency member concerning the grounds for disqualification at the hearing or by deposition unless ordered by the administrative judge or hearing officer conducting the hearing and agreed to by the agency member.

(d) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for an individual who becomes unavailable as a result of disqualification or any other reason, the substitute shall be appointed, unless otherwise provided by law:

(1) By the governor, if the unavailable individual is a cabinet member or elected official except that the

speaker of the senate and house of representatives shall appoint a substitute for individuals elected by the general assembly; or

(2) By the appointing authority, if the unavailable individual is an appointed official.

(f) Any action taken by a duly appointed substitute for an unavailable individual shall be as effective as if taken by the unavailable individual. [Acts 1982, ch. 874, § 38.]

4-5-303. Separation of functions.—(a) A person who has served as an investigator, prosecutor or advocate in a contested case may not serve as an administrative judge or hearing officer or assist or advise an administrative judge or hearing officer in the same proceeding.

(b) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case may not serve as an administrative judge or hearing officer or assist or advise an administrative judge or hearing officer in the same proceeding.

(c) A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may not serve as an administrative judge or hearing officer or assist or advise an administrative judge or hearing officer in the same proceeding.

(d) A person may serve as an administrative judge or hearing officer at successive stages of the same contested case, unless a party demonstrates grounds for disqualification in accordance with § 4-5-302.

(e) A person who has participated in a determination of probable cause or other equivalent preliminary determination or participated or made a decision which is on administrative appeal in a contested case may serve as an agency member in the contested case where authorized by law and not subject to disqualification or other cause provided in this chapter. [Acts 1982, ch. 874, § 39.]

4-5-304. Ex parte communications.—(a) Unless required for the disposition of ex parte matters specifically authorized by statute an administrative judge, hearing officer, or agency member serving in a contested case proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any person without notice and opportunity for all parties to participate in the communication.

(b) Notwithstanding subsection (a), an administrative judge, hearing officer or agency member may communicate with agency members regarding a matter pending before the agency or may receive aid from staff assistants, members of the attorney general's staff, or a licensed attorney, if such persons do not receive ex parte communications of a type that the administrative judge, hearing officer, or agency members would be prohibited from receiving, and do not furnish, augment, diminish, or modify the evidence in the record.

(c) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to a contested case, and no other person may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding

is pending, with any person serving as an administrative judge, hearing officer, or agency member without notice and opportunity for all parties to participate in the communication.

(d) If, before serving as an administrative judge, hearing officer or agency member in a contested case, a person receives an ex parte communication of a type that may not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) An administrative judge, hearing officer, or agency member who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the person received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within ten (10) days after notice of the communication.

(f) An administrative judge, hearing officer or agency member who receives an ex parte communication in violation of this section may be disqualified if necessary to eliminate the effect of the communication.

(g) The agency shall, and any party may, report any willful violation of this section to appropriate

authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section. [Acts 1982, ch. 874, § 41.]

4-5-305. Representation.—(a) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, unless prohibited by any provision of law, other representative. [Acts 1982, ch. 874, § 43.]

4-5-306. Pre-hearing conferences.—(a)(1) In any action set for hearing, the administrative judge or hearing officer assigned to hear the case, upon its or his own motion, or upon motion of one of the parties or their qualified representatives, may direct the parties and/or the attorneys for the parties to appear before it or him for a conference to consider:

- (A) The simplification of issues;
- (B) The necessity or desirability of amendments to the pleadings;
- (C) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (D) The limitation of the number of expert witnesses;
- (E) Such other matters as may aid in the disposition of the action.

(2) The administrative judge or hearing officer shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements of the parties, and such order when entered controls the subsequent course of the action, unless modified at the hearing to prevent manifest injustice.

(b) Upon reasonable notice to all parties the administrative judge or hearing officer may convene a hearing or convert a pre-hearing conference to a hearing, to be conducted by the administrative judge or hearing officer sitting alone, to consider argument and/or evidence on any question of law. The administrative judge or hearing officer may render an initial order, as otherwise provided by this chapter, on the question of law.

(c) In the discretion of the administrative judge or hearing officer, all or part of the pre-hearing conference may be conducted by telephone, television, or other electronic means, if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(d) If a pre-hearing conference is not held, the administrative judge or hearing officer for the hearing may issue a pre-hearing order, based on the pleadings, to regulate the conduct of the proceedings. [Acts 1974, ch. 725, § 8; 1975, ch. 370, §§ 3, 12; 1978, ch. 938, §§ 4, 5; T.C.A., §§ 4-514, 4-5-108(d); Acts 1982, ch. 874, §§ 44, 54.]

4-5-307. Notice of hearing.—(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) In all proceedings the notice shall include:

(1) A statement of the time, place, nature of the hearing, and the right to be represented by counsel;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the statutes and rules involved; and

(3) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon timely, written application a more definite and detailed statement shall be furnished ten (10) days prior to the time set for the hearing. [Acts 1974, ch. 725, § 8; 1975, ch. 370, §§ 3, 12; 1978, ch. 938, §§ 4, 5; T.C.A., §§ 4-514, 4-5-108(a), (b); Acts 1982, ch. 874, §§ 45, 54.]

4-5-308. Filing pleadings, briefs, motions, etc.—Service.—(a) The administrative judge or hearing officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections and offers of settlement.

(b) The administrative judge or hearing officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

(c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule. [Acts 1982, ch. 874, § 46.]

4-5-309. Default.—(a) If a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge or hearing officer, hearing the case alone, or agency, sitting with the administrative judge or hearing officer, may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

(b) If the proceedings are conducted without the participation of the party in default the administrative judge or hearing officer, hearing the case alone, shall include in the initial order a written notice of default, otherwise, the agency, sitting with the administrative judge or hearing officer, shall include such written notice of default in the final order. If the proceedings are adjourned and not conducted the administrative judge or hearing officer, hearing the case alone, may render an initial default order, otherwise, the agency, sitting with the administrative judge or hearing officer, may render a final default order. All default orders and notices of default in default orders shall include a written statement of the grounds for the default.

(c) A party may petition to have a default set aside by filing a timely petition for reconsideration as provided in § 4-5-317.

(d) If a party fails to file a timely petition for reconsideration or the petition is not granted, the administrative judge or hearing officer, sitting alone,

or agency, sitting with the administrative judge or hearing officer, shall conduct any further proceedings necessary to complete the contested case without the participation of the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party. [Acts 1982, ch. 874, § 47.]

4-5-310. Intervention.—(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

(b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the administrative judge or hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is

granted or at any subsequent time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

(2) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(d) The administrative judge, hearing officer or agency, at least twenty-four (24) hours before the hearing, shall render an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The administrative judge, hearing officer or agency may modify the order at any time, stating the reasons for the modification. The administrative judge, hearing officer or agency shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties. [Acts 1982, ch. 874, § 48.]

4-5-311. Discovery—Subpoenas.—(a) The administrative judge or hearing officer at the request of any party shall issue subpoenas, effect discovery, and issue protective orders, in accordance with the Tennessee Rules of Civil Procedure, except that service in contested cases may be by certified mail in addition to means of service provided by the Tennessee Rules

of Civil Procedure. The administrative judge or hearing officer shall decide any objection relating to discovery under this chapter or the Tennessee Rules of Civil Procedure. Witnesses under subpoena shall be entitled to the same fees as are now or may hereafter be provided for witnesses in civil actions in the circuit court and, unless otherwise provided by law or by action of the agency, the party requesting the subpoenas shall bear the cost of paying fees to the witnesses subpoenaed.

(b) In case of disobedience to any subpoena issued and served under this section or to any lawful agency requirement for information, or of the refusal of any person to testify in any matter regarding which he may be interrogated lawfully in a proceeding before an agency, the agency may apply to the circuit or chancery court of the county of such person's residence, or to any judge or chancellor thereof, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. Forthwith the court shall cite the respondent to appear and shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unlawful, the court shall enter an order requiring compliance. Disobedience of such order shall be punished as contempt of court in the same manner and by the same procedure as is provided for like conduct committed in the course of judicial proceedings.

(c) The agency may promulgate rules to further prevent abuse and oppression in discovery.

(d) Any party to a contested case shall have the right to inspect the files of the agency with respect to the matter and to copy therefrom, except that rec-

ords may not be inspected the confidentiality of which is protected by law. [Acts 1974, ch. 725, §§ 10, 11; 1975, ch. 370, § 4; 1978, ch. 938, §§ 9, 10, 11; T.C.A., §§ 4-516, 4-517, 4-5-110(b), 4-5-111(c); Acts 1982, ch. 874, §§ 49, 50.]

4-5-312. Procedure at hearing.—(a) The administrative judge or hearing officer shall regulate the course of the proceedings, in conformity with the pre-hearing order if any.

(b) To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.

(c) In the discretion of the administrative judge or hearing officer and agency members and by agreement of the parties, all or part of the hearing may be conducted by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceedings while it is taking place.

(d) The hearing shall be open to public observation pursuant to the provisions of chapter 44 of title 8 unless otherwise provided by state or federal law. To the extent that a hearing is conducted by telephone, television, or other electronic means the availability of public observation shall be satisfied by giving members of the public an opportunity, at reasonable times, to hear the tape recording and to inspect any transcript

obtained by the agency, except as otherwise provided by § 50-7-701. [Acts 1982, ch. 874, § 51.]

4-5-313. Rules of evidence—Affidavits—Official notice.—In contested cases:

(1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality of certain records and shall exclude evidence which in its judgment is irrelevant, immaterial, or unduly repetitious.

(2) At any time not less than ten (10) days prior to a hearing or a continued hearing, any party shall deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice in the form provided in subdivision (4). Unless the opposing party within seven (7) days after delivery delivers to the proponent a request to cross-examine an affiant, his right to cross-examination of such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after a proper request is made as herein provided, the affidavit shall not be admitted into evidence. Delivery for purposes of this section shall mean actual receipt.

(3) The officer assigned to conduct the hearing may admit affidavits not submitted in accordance with this section where necessary to prevent injustice.

(4) The notice referred to in subdivision (2) shall contain the following information and be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of the proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven (7) days after the date of mailing or delivering the affidavit to the opposing party).

(5) Documentary evidence otherwise admissible may be received in the form of copies or excerpts, or by incorporation by reference to material already on file with the agency. Upon request, parties shall be given an opportunity to compare the copy with the original, if reasonably available.

(6) Official notice may be taken of:

(A) Any fact that could be judicially noticed in the courts of this state;

(B) The record of other proceedings before the agency;

(C) Technical or scientific matters within the agency's specialized knowledge; and

(D) Codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association.

Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed. [Acts 1974, ch. 725, § 9; 1978, ch. 938, §§ 6-8; T.C.A., §§ 4-515, 4-5-109; Acts 1982, ch. 874, § 52.]

4-5-314. Final order—Initial order.—(a) An agency with statutory authority to decide a contested case shall render a final order.

(b) If an administrative judge or hearing officer hears a case alone under § 4-5-301(a)(2), the administrative judge or hearing officer shall render an initial order, which shall become a final order unless reviewed in accordance with § 4-5-315.

(c) A final order, initial order or decision under § 50-7-304 shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The final order, initial order or decision must also in-

clude a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order. An initial order or decision shall include a statement of any circumstances under which the initial order or decision may, without further notice, become a final order.

(d) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. The agency member's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

(e) If an individual serving or designated to serve as an administrative judge, hearing officer or agency member becomes unavailable, for any reason, before rendition of the final order or initial order or decision, a substitute shall be appointed as provided in § 4-5-302. The substitute shall use any existing record and may conduct any further proceedings as is appropriate in the interest of justice.

(f) The administrative judge or hearing officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order rendered pursuant to subsection (a) or initial order rendered pursuant to subsection (b) shall be rendered in writing within ninety (90) days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless such period is waived or extended with the written consent of all parties or for good cause shown.

(h) The agency shall cause copies of the final order under subsection (a) and the administrative judge or hearing officer shall cause copies of the initial order under subsection (b) to be delivered to each party. [Acts 1982, ch. 874, § 54.]

4-5-315. Review of initial order.—(a) The agency upon the agency's motion may, and where provided by federal law or upon appeal by any party shall, review an initial order, except to the extent that:

(1) A statute or rule of the agency precludes or limits agency review of the initial order; or

(2) The agency in the exercise of discretion conferred by statute or rule of the agency:

(A) Determines to review some but not all issues, or not to exercise any review;

(B) Delegates its authority to review the initial order to one or more persons; or

(C) Authorizes one or more persons to review the initial order, subject to further review by the agency.

(b) A petition for appeal from an initial order shall be filed with the agency, or with any person designated for such purpose by rule of the agency, within ten (10) days after entry of the initial order. If the agency on its own motion decides to review an initial order, the agency shall give written notice of its intention to review the initial order within ten (10) days after its entry. The ten-day period for a party to file a petition for appeal or for the agency to give notice of its intention to review an initial order on the agency's own motion shall be tolled by

the submission of a timely petition for reconsideration of the initial order pursuant to § 4-5-317, and a new ten-day period shall start to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency on its own motion, the petition for reconsideration shall be disposed of first, unless the agency determines that action on the petition for reconsideration has been unreasonably delayed.

(c) The petition for appeal shall state its basis. If the agency on its own motion gives notice of its intent to review an initial order, the agency shall identify the issues that it intends to review.

(d) The person reviewing an initial order shall exercise all the decision-making power that the agency would have had to render a final order had the agency presided over the hearing, except to the extent that the issues subject to review are limited by rule or statute or by the agency upon notice to all parties.

(e) The agency shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) Before rendering a final order, the agency may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the agency considers necessary.

(g) The agency may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a

matter, the agency may order such temporary relief as is authorized and appropriate.

(h) A final order or an order remanding the matter for further proceedings pursuant to this section, shall be rendered and entered in writing within sixty (60) days after receipt of briefs and oral argument, unless that period is waived or extended with the written consent of all parties or for good cause shown.

(i) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between such order and the initial order, and shall include, or incorporate by express reference to the initial order, all the matters required by § 4-5-314(c).

(j) The agency shall cause copies of the final order or order remanding the matter for further proceedings to be delivered to each party and to the administrative judge or hearing officer who conducted the contested case. [Acts 1982, ch. 874, § 55.]

4-5-316. Stay.—A party may submit to the agency a petition for stay of effectiveness of an initial or final order within seven (7) days after its entry unless otherwise provided by statute or stated in the initial or final order. The agency may take action on the petition for stay, either before or after the effective date of the initial or final order. [Acts 1982, ch. 874, § 56.]

4-5-317. Reconsideration.—(a) Any party, within ten (10) days after entry of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. However, the filing of the petition shall not be a prerequisite for seeking administrative or judicial review.

(b) The petition shall be disposed of by the same person or persons who rendered the initial or final order, if available.

(c) The person or persons who rendered the initial or final order, which is the subject of the petition, shall, within twenty (20) days of receiving the petition, enter a written order either denying the petition, granting the petition and setting the matter for further proceedings; or granting the petition and issuing a new order, initial or final, in accordance with § 4-5-314. If no action has been taken on the petition within twenty (20) days, the petition shall be deemed to have been denied.

(d) An order granting the petition and setting the matter for further proceedings shall state the extent and scope of the proceedings, which shall be limited to argument upon the existing record, and no new evidence shall be introduced unless the party proposing such evidence shows good cause for his failure to introduce the evidence in the original proceeding.

(e) The sixty-day period for a party to file a petition for review of a final order shall be tolled by granting the petition and setting the matter for further proceedings, and a new sixty-day period shall start to run upon disposition of the petition for reconsideration by issuance of a final order by the agency. [Acts 1982, ch. 874, § 58.]

4-5-318. Effectiveness of new order.—(a) Unless a later date is stated in an initial or final order, or a stay is granted, an initial or final order shall become effective upon entry of the initial or final order.

All initial and final orders shall state when the order is entered and effective.

(b) If the agency has utilized an administrative judge from the administrative procedures division of the office of the secretary of state, the initial or final order shall not be deemed entered until the initial or final order has been filed with the administrative procedures division.

(c) The agency shall establish which agency members, officials or employees may sign final orders rendered by the agency.

(d) A party may not be required to comply with a final order unless the final order has been mailed to the last known address of the party or unless the party has actual knowledge of the final order.

(e) A nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or unless the nonparty has actual knowledge of the final order.

(f) Unless a later date is stated in an initial order or a stay is granted, the time when an initial order becomes a final order in accordance with § 4-5-314 shall be as follows:

(1) When the initial order is entered, if administrative review is unavailable;

(2) When the agency enters an order stating, after a petition for appeal has been filed, that review will not be exercised, if discretion is available to make a determination to this effect; or

(3) Ten (10) days after entry of the initial order, if no party has filed a petition for appeal and the agency has not given written notice of its intention to exercise review.

(g) An initial order that becomes a final order in accordance with subsection (f) and § 4-5-314, shall be effective upon becoming a final order; provided, however:

(1) A party may not be required to comply with the final order unless the party has been served with or has actual knowledge of the initial order or of an order stating that review will not be exercised; and

(2) A nonparty may not be required to comply with the final order unless the agency has made the initial order available for public inspection and copying or the nonparty has actual knowledge of the initial order or of an order stating that review will not be exercised.

(h) This section shall not preclude an agency from taking immediate action to protect the public interest in accordance with § 4-5-320. [Acts 1982, ch. 874, § 59.]

4-5-319. Record.—(a) An agency shall maintain an official record of each contested case under this chapter. The record shall be maintained for a period of time not less than three (3) years, provided, however that the Department of Employment Security and Board of Review under § 50-7-601 shall be required to maintain the record for such period of time as shall be determined by the agency or otherwise required by law.

- (b) The agency record shall consist solely of:
- (1) Notice of all proceedings;
 - (2) Any pre-hearing order;
 - (3) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
 - (4) Evidence received or considered;
 - (5) A statement of matters officially noticed;
 - (6) Proffers of proof and objections and rulings thereon;
 - (7) Proposed findings, requested orders, and exceptions;
 - (8) The tape recording, stenographic notes or symbols, or transcript of the hearing;
 - (9) Any final order, initial order, or order on reconsideration;
 - (10) Staff memoranda or data submitted to the agency unless prepared and submitted by personal assistants and not inconsistent with § 4-5-304(b);
 - (11) Matters placed on the record after an ex parte communication.

(c) A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. Such record or any part thereof shall be transcribed on request of any party at his expense or may be transcribed by the agency at its expense. If the agency elects to transcribe the proceedings, any party shall be provided copies of the transcript upon payment to the agency of a reasonable compensatory fee.

(d) Except to the extent that this chapter or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in adjudicative proceedings under this chapter, and for judicial review thereof. [Acts 1974, ch. 725, § 8; 1975, ch. 370, §§ 3, 12; 1978, ch. 938, §§ 4, 5; T.C.A., §§ 4-5-14, 4-5-108(g); Acts 1982, ch. 874, § 60.]

4-5-320. Proceedings affecting licenses.—(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These pro-

ceedings shall be promptly instituted and determined. [Acts 1974, ch. 725, § 16; T.C.A., §§ 4-522, 4-5-116; Acts 1982, ch. 874, § 61.]

4-5-321. Administrative procedures division—Duties.—There is created in the office of the secretary of state a division to be known as the administrative procedures division. This division shall have the following responsibilities:

(1) Investigate any conflicts or inequities which may develop between federal administrative procedures, and state administrative procedures and propose any amendments to this chapter to correct those inconsistencies and inequities as they develop;

(2) Establish and maintain in cooperation with the office of the attorney general a pool of administrative judges and hearing officers, who shall be learned in the law;

(3) Establish and maintain in cooperation with the office of the attorney general a pool of court reporters for agency administrative hearing proceedings before the licensing boards which are under the supervision of the department of commerce and insurance and the department of health and environment;

(4) Perform any and all other functions assigned to the secretary of state under this chapter and delegated by him to the administrative procedures division. [Acts 1974, ch. 725, § 21; 1975, ch. 370, § 17; 1978, ch. 938, § 16; 1979, ch. 371, § 2; T.C.A., §§ 4-527, 4-5-121(a); Acts 1982, ch. 874, § 62; 1984, ch. 728, § 12.]

4-5-322. Judicial review.—(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review.

(2) A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) (1) Proceedings for review are instituted by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the entry of the agency's final order thereon.

(2) A person who is aggrieved by a final decision of the department of human services in a contested case may file a petition for review in the chancery court located either in the county of the official residence of the commissioner or in the county in which any one or more of the petitioners reside.

(3) The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition for reconsideration.

(4) Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing which shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the chancellor, shall be given by the petitioner conditioned to indemnify the other per-

sons who might be so injured and if no bond amount is sufficient, the stay shall be denied.

(d) Within forty-five (45) days after service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all the parties of the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(f) The procedure ordinarily followed in chancery courts will be followed in the review of contested cases decided by the agency, except as otherwise provided in this chapter.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before

the agency, not shown in the record, proof thereon may be taken in the court.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which affect the merits of the decision complained of.

(j) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record. [Acts 1974, ch. 725, § 17; 1975, ch.

370, § 6; 1978, ch. 815, § 1; 1978, ch. 938, § 13; T.C.A., § 4-523; Acts 1980, ch. 478, § 1; T.C.A., § 4-5-117; Acts 1982, ch. 874, § 63.]

4-5-323. Appeals to Court of Appeals.—(a) An aggrieved party may obtain a review of any final judgment of the chancery court under this chapter by appeal to the Court of Appeals of Tennessee.

(b) The record certified to the chancery court and the record in the chancery court shall constitute the record in an appeal. Evidence taken in court pursuant to § 4-5-322(g) shall become a part of the record.

(c) The procedure on appeal shall be governed by the Tennessee Rules of Appellate Procedure. [Acts 1974, ch. 725, § 18; 1977, ch. 298, § 1; T.C.A., § 4-524; Acts 1981, ch. 449, § 2; T.C.A., § 4-5-118; Acts 1982, ch. 874, § 64.]

8
No. 85-588

Supreme Court, U.S.
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MAR 7 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

vs.

ROBERT B. ELLIOTT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether issue preclusion should be applied where a state agency did not afford an employee a full and fair opportunity to litigate and failed to decide most of the issues and claims in his federal civil rights action?
2. Whether unreviewed administrative determinations of state agencies should preclude a trial de novo in federal court under Title VII or the Reconstruction Civil Rights Statutes?

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STATEMENT OF THE CASE

This is an action challenging racial discrimination in employment and in the operation of the programs of the University of Tennessee ("the University") and its Institute of Agriculture's Agricultural Extension Service ("AES"). The University, one of the petitioners, is a land grant university that administers¹ AES through its Institute of Agriculture. PA 45. AES utilizes federal funds to

¹ The following abbreviations are used throughout this brief to cite to the record: "PA" (Appendix to the petition for writ of certiorari); "JA" (Joint Appendix filed with the brief for petitioner); "Pet. Br. A" (Appendix contained in petitioner's brief); "App. 6th Cir." (the appendix filed with the Sixth Circuit); "Dkt. Nr." (the number assigned to documents filed in the district court and listed in the docket); "Tr." (transcript of the hearing before the administrative agency). Excerpts from the hearing transcript appear in an appendix to this brief (Res. Br. a__).

provide assistance and information to the state's farmers. Id.; Tenn. Code Ann. § 49-50-101, 102. It also administers educational programs in agricultural production and marketing, home economics, and community development, as well as 4-H youth programs. PA 48.

The respondent, Robert B. Elliottt, is a black male employed by AES, and therefore the University, as an Agricultural Extension Agent. PA 37, 45.

The Charge Letter

In December, 1981, respondent received a letter from his immediate supervisor proposing to terminate his employment. JA 21. The letter advised respondent that he could request a hearing to contest charges of inadequate job performance and improper behavior, and

that a failure to request a hearing within five days would result in the termination of his employment. JA 21-22.

Under the University's procedures, respondent could contest the charges by way of either the University's informal, internal hearing procedure, or he could request a hearing under the contested case provisions of the Tennessee Uniform Administrative Procedures Act. Id. Respondent chose the latter means of protesting his proposed termination.

Respondent's Federal Action

Prior to the commencement of administrative proceedings and believing that the actions being taken against him were part of a pattern and practice of racial discrimination by his employer, respondent initiated this action by filing a complaint in the Western District of Tennessee, on January 14, 1982.

A. The Complaint Allegations

Respondent's complaint alleged that the University, AES and the other named defendants were engaged in a substantial number of unlawful actions that fell into three distinct categories: classwide racially discriminatory practices, actions taken in retaliation against respondent because of his civil rights activities, and actions specifically directed against respondent because of his race. Respondent alleged that the defendants' actions violated the First, Thirteenth, and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 2000d and e ("Title VII").

(1) Class Claims. Many of the alleged classwide discriminatory practices were of the sort which, if present, would have had an immediate and direct adverse

impact on respondent. Respondent asserted, for example, that it was the general practice of petitioners to discriminate against black employees in compensation, assignments, promotion and training. JA 7, 10, 11. Respondent also contended that petitioners deliberately and systematically operated AES programs in a manner that discriminated against and segregated black members of the public; respondent objected that, as an AES employee, he was thus required to participate in unconstitutional and illegal action. JA 7, 8, 10. The complaint also alleged the existence of other discriminatory practices, such as intentional discrimination in the selection of the supervisory officials to whom respondent was subordinate. JA 10, 11.

(2) Retaliation Claims. The complaint alleged that a number of specific actions had been taken against respondent in retaliation for his civil rights activities, retaliation that respondent asserted violated both the First and Fourteenth Amendments. The complaint spelled out those civil rights activities in detail, noting several instances in which respondent had formally complained about racial discrimination within AES itself. JA 11-12. Respondent set forth a number of specific actions that he claimed were taken for retaliatory purposes, including harassment, false allegations of improper or inadequate behavior, and the attempt to bring about his dismissal. JA 7, 14, 15. Respondent attributed these actions to two different conspiracies among the defendants: one precipitated by his action in objecting to the use of the

phrase "nigger" by an official at an extension service fair, and one involving efforts by the white members of the Madison County Agricultural extension Service Committee to persuade AES to fire respondent. JA 12-14.

(3) Individual Employment Claims.

Third, the complaint alleged that on a number of occasions adverse personnel actions had been taken against respondent because of his race. The actions attributed to such a specific racial motive included reassignments, harassment, the filing of false charges of incompetence or misbehavior, and the commencement of dismissal proceedings. JA 7, 11, 14, 15.

B. The Defendants Named in Complaint

The complaint named fourteen distinct defendants, whose identity is important to an understanding of the scope of the administrative decision. Two of the

defendants are state agencies, the University and AES, and five of the defendants are employees of those agencies -- Edward Boling, Willis W. Armistead, M. Lloyd Downen, Haywood Luck and Curtis Shearon. Also named as defendants were five individuals who were not AES employees, but who served as members of the Madison County Agricultural Extension Service Committee -- Billy Donnell, Arthur Johnson, Mrs. Neil Smith, Jimmy Hopper and Mrs. Robert Cathey. Respondent worked in Madison County, and it was these individuals who were alleged to have initiated the action seeking respondent's dismissal. Finally, the complaint named as defendants Murray Truck Lines, Inc., a company operating in Madison County, and its manager Tom Korwin, as well as Tommy Coley.

It was actions taken by these two individuals that allegedly prompted the retaliation described above. JA 5-6.

C. Relief Sought in The Complaint

Respondent sought preliminary and permanent injunctive relief, for himself individually and for members of a class sought to be certified, as well as individual and class-wide monetary damages. The complaint also sought a temporary restraining order to prevent the University from taking any adverse employment action against respondent. JA 17-18.

D. District Court's Orders Denying Injunctive Relief

The district court issued a temporary restraining order, pending an answer to the complaint and an opportunity for the

court to hold a limited hearing during the month of February. Order, Jan. 19, 1982, Dkt. Nr. 4.

The University moved to dissolve the restraining order, arguing, inter alia, that the action was not ripe for judicial review because respondent had not yet been dismissed from his employment and that "judicial review should be postponed" until the conclusion of the administrative² hearing. The court thereupon withdrew the restraining order "without in any fashion, adjudicating the merits of this controversy," based on the pendency of the hearing. Order, Feb. 23, 1982, Dkt. Nr.

² App. 6th Cir. pp. 38-39. The University also argued that respondent had not met the prerequisites for injunctive relief and that the court did not have jurisdiction over certain defendants and did not have jurisdiction to hear the Title VII claims because no right-to-sue letter had been issued. App. 6th Cir. 48-52. A right-to-sue letter was issued November 19, 1982.

12 (App. 6th Cir. p. 165). One month later, The district court declined to grant any preliminary relief, finding that while affidavits filed with the court indicated "sharp conflict with regard to the issues in this case on the merits," respondent had not shown irreparable harm and that any relief must await a "hearing and trial on the merits." Order, Mar. 29, 1982, Dkt. Nr. 14 (App. 6th Cir. p. 167).

The Administrative Proceedings

Shortly thereafter the administrative proceedings began. Respondent's administrative hearing was governed by the contested case provisions of the Tennessee Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. §§ 4-5-301, et seq. (Pet. Br. A6-36). Under those provisions, the hearing may be conducted by a requisite number of members of the agency involved, as well as an adminis-

trative judge or hearing officer. Alternatively, the hearing may be conducted by an administrative judge or hearing officer sitting alone. Tenn. Code Ann. § 4-5-301(b) (Br. App. A7). The statute provides for discovery, the filing of briefs, and for the admission of evidence in parity with the civil rules of evidence.³ There is no de novo review of claims presented during the hearing, rather, review of the agency's final decision is limited to a review of the record to determine whether substantial evidence exists to support the decision. Tenn. Code Ann. § 4-5-322(h) (Pet. Br. A32-35).

³ Tenn. Code Ann. §§ 4-5-308, 4-5-311, § 4-5-313(1) (Pet. Br. A14, 17-22). The statute permits the agency to rely on evidence not otherwise admissible if it is ... "of a type commonly relied on by reasonably prudent men in the conduct of their affairs." Id.

A. The Hearing

(1) The Hearing Examiner. Respondent's administrative hearing was conducted by a hearing examiner sitting alone, between April and October 1982. Ignoring respondent's request that the hearing be conducted by someone entirely unconnected with either the University or AES,⁴ the University's Vice-President for Agriculture, W.W. Armistead, one of the individuals named as a defendant in the federal court litigation, assigned his Assistant Vice-President for Agriculture,⁵ B. H. Pentecost, to hear the case. P.A. 182; Tr. I, 3.

⁴ See App. 6th Cir. p.63 (letter dated January 5, 1982, attached as exhibit B to initial Motion to Dismiss, Dkt. Nr. 6).

⁵ The statute provides for cases to be heard by one employed by the Secretary of State, upon agency request. Tenn. Code Ann. § 4-5-301(d)

(2) The Participants. Two parties participated in the hearing: respondent and the University. Both were represented by counsel. None of the other parties named as defendants in the complaint participated, except that some of these persons appeared as witnesses for the University. None of the non-University defendants was represented or participated⁶ in the examination of witnesses.

(3) The Charges. The University claimed that respondent's dismissal was justified by ten charges. These charges ranged from insubordination to playing golf and conducting personal business on⁷ working hours.

⁶ See, generally, hearing transcript.

⁷ The specific charges, as outlined in the hearing examiner's opinion, included the following: (1) playing golf during working hours on one occasion in 1976, one occasion in 1981 and on one occasion in 1982; (2) engaging in non-University business during working hours on several

B. The Scope of the Hearing

At the outset of the hearing respondent sought to file a statement of "counter-issues" asserting that the charges had been filed "because of racial prejudice ... and/or because of his complaints against racial discrimination..."⁸ Petitioners promptly and

occasions in 1980; (3) making or allowing to be made harassing telephone calls to a private citizen; (4) improper job behavior in the use of abusive language and trespassing on one occasion; (5) improper job behavior in the use, on one occasion, of profane language" in public; (6) certain instances of leaving work prior to the end of a work day; (7) charging long-distance telephone calls to the University; (8) being insubordinate, and thereby violating a University work rule, by failing to complete certain work assignments; (9) failing to complete assignments, thereby performing his job inadequately; and (10) violation of a University work rule by the use of profane language on two occasions PA 39-43.

⁸ PA 43-44.

successfully objected to this proposed statement:

We would respectfully submit ... that the statement of counter-issues are completely improper, and we would point out to the Hearing Examiner that a civil proceeding ... is presently under way, in the United States District Court ... wherein the Employee ... has sued the University Agricultural Extension Service and many of the University officials for the exact charges that have been raised in the counter-charges by counsel at this time; and that those issues are not before this proceeding, but are in fact before⁹ the Federal Court in another matter.

⁹ Transcript of Administrative Hearing volume i, pp. 33-34 (Res. Br. a1-2) (hereinafter cited as Tr.). In its Proposed Findings of Fact and Conclusions of Law submitted in the administrative hearing, the University urged:

[T]here is no jurisdiction in this ... case to try counter charges of the employee that the University's proposed action violates 42 U.S.C. §§ 1981, 1982, 1983, 1985 or 1986.... [N]o jurisdiction exists in this forum to try a race discrimination case under Title VII.... [I]f jurisdiction exists over these civil rights actions, it exists in the federal district court and not in this administrative hearing.

pp. 4-5.

The hearing examiner sustained that objection, holding that the administrative proceeding was "not a proper forum to hear these particular issues",¹⁰ and expressly basing that decision on "the understanding that these counter issues will be afforded ample opportunity [for a hearing] in a proper Court."¹¹

Counsel for the University continued throughout the administrative hearing to assert that the discrimination issues belonged in federal court alone, stating that it was 'improper

¹⁰ Id. at 40.

¹¹ Id. at 36-37.

to have to try a Title VII discrimination lawsuit here at this forum, and there is no jurisdiction in this forum for such a case.... I will continue to object to all efforts to try ... a Federal lawsuit here, in this hearing.¹²

The hearing examiner reiterated with equal consistency his understanding that the discrimination issues could and would be resolved in the federal action:

I cannot, by the authority granted me under this Administrative Procedure Act, make determinations relative to discrimination... I believe that you are going to have your day in court, as I stated earlier in this hearing, there is another forum for certain aspects of the racial issues, and I absolutely have no authority to rule on them.¹³

¹² Tr. xix, p. 129. See also Tr. xxiii, p. 92 ("There has been an Employment Equal Opportunity Commission [sic] charge filed, by Mr. Elliott, against the Agricultural Extension Service for alleged racial discrimination in the Madison County Office. This is not the place to try that or to investigate it.")

¹³ Tr. v. xxiii, p. 97.

The hearing examiner made clear he would consider, at most, only the claim that the university officials had acted for discriminatory purposes when they filed the particular charges at issue in the administrative proceeding.

C. Excluded Evidence

Throughout the administrative proceeding counsel for the University consistently and with almost complete success objected to evidence of discrimination on the ground that it belonged only in the federal action, and had no relevance to the issues in that administrative action.

Respondent repeatedly, sought to introduce evidence that AES had never disciplined whites for the sort of minor infractions with which he was charged; counsel for the university successfully objected to that evidence on the ground

that discrimination in discipline was a matter which only the federal court could consider:

We are here to find if the charge [against respondent] is to be sustained or not. This is not a Title VII race discrimination case. The kind of testimony that is asked to be elicited ... relates to that and would relate in that case and the jurisdiction of that case is the United States District Court ... and this hearing has no jurisdiction over those matters.... And also there is an EEOC complaint, and the EEOC will investigate this. For it to be brought out here and no is wrong. It's wrong because it's irrelevant and it's immaterial. This administrative proceedings [sic] doesn't have jurisdiction over those matters.¹⁴

The hearing examiner consistently excluded evidence that whites had not been dis-

¹⁴ Tr. xxvii, pp. 27-28. Other instances in which the University successfully objected to evidence of racial discrimination in discipline are to be found at i, pp. 149, 152-53; ix, pp. 111-125; ix, pp. 132, 136-37; xi, pp. 29, 33-34; xii, p. 156; xiii, pp. 12-14; xvi, p. 32 (Res. Br. a4-6; 9-19).

ciplined for conduct similar to that with which respondent was charged, explaining "You have another forum, I believe that you are already in court, to bring this ..."¹⁵

Other evidence was excluded for the same reason. When respondent sought to prove that his work assignments had been changed because of a policy of segregating 4-H Clubs, and of assigning only white employees to clubs with white members, the university objected that such evidence "doesn't have anything to do with the charges in this case. It may have something to do with [respondent's] lawsuit, which he has brought, his class action against the Extension Service."¹⁶

¹⁵ Tr. ii, p. 152.

¹⁶ Tr. xxiii, p. 30. Similar successful objections to evidence regarding discrimination in the operation of the 4-H clubs can be found at Tr. xxix, p. 26 ("[T]here's other proceedings already

The hearing examiner repeatedly refused to consider such evidence regarding discrimination in the operation or staffing of 4-H clubs, explaining "I am not getting further into the issue which I know is going to come before a Federal Judge, who is competent and has the authority to listen to his ..."¹⁷ When respondent sought to introduce an EEOC study of employment practices within the Extension Service,

under way for that to be investigated."), 107 ("I object to going further in the matter of complaints about the 4-H Club. It is a different matter and a different lawsuit and different place."); xxxiiii, p. 133 ("This isn't the place. We have a lawsuit in which those issues are present."); xliv, pp. 23-26 ("It's irrelevant to this proceeding. There's another proceeding that it'd be relevant to ... The case that's in Federal Court, I don't think we should go into here... The point is, Mr. Hearing examiner, that well, very well, may be an issue regarding this class action, that has been brought against the university. But this is not the place to try this class action.").

¹⁷ Tr. xxix, p. 109.

the University objected that such evidence related only to the "Title VII lawsuit that has been filed [against the Defendants]... in Federal Court"¹⁸ and the hearing examiner held that the evidence was irrelevant in light of his decision the first day of the hearing that the respondent could not litigate his federal discrimination claims in the administrative proceeding.¹⁹ When counsel for respondent sought to ask questions about disparities in the salaries of black and white employees, counsel for the University objected that a complaint about salary discrimination should be raised with "the proper authorities... This is not the place to look at it."²⁰ and the

¹⁸ Tr. xix, p. 124.

¹⁹ Tr. xix, p. 128.

²⁰ Tr. xxxiii, p. 4.

hearing examiner held that "[t]his is not ... the proper forum for this to be asked."²¹

Excluded summary manner was evidence of obvious relevance to respondent's federal claims, such as proof of racial discrimination in promotions²² and evidence that retaliatory action may have been taken against respondent because of his civil rights activities.²³

Throughout the trial the University continued to successfully object on this ground to evidence of discrimination,

²¹ Id.

²² Tr. xix, pp. 144-45.

²³ Tr. i, p. 76, v. iii, p. 422. See also Tr. xxvi, pp. 153-55 (excluding evidence of statewide discriminatory practices); xxviii, p. 210 (excluding evidence regarding what types of discrimination might have been apparent in respondent's office); xlv, pp. 33-34 (excluding evidence regarding discrimination in the selection of county committee members.)

which it insisted was only relevant to the federal claims. When respondent sought to prove the existence of discrimination in the operation of AES programs, the University argued that such evidence should be considered only in the "civil rights action brought by the employee in the United States District Court ... since the employee, by his own choice, has chosen that forum in which to bring a[n] action of racial discrimination."²⁴

Respondent attempted to adduce evidence that during extension service meetings blacks were referred to by their first names, while whites were referred to as Mr. and Mrs.; the University successfully objected on the ground that "this is not the place to try the race discrimination

²⁴ Tr. iv, p. 484. See also id. at 486 ("[T]he case against the University in Federal Court, should not be tried through this witness here.")

case against the Agricultural Extension Service."²⁵ Similarly, counsel for the University prevented respondent from asking questions about racial discrimination in employee ratings, arguing "You can go into that in the Federal Court case if it's part of the pattern o[r] practice, but it doesn't relate here."²⁶ Efforts to show that respondent's immediate supervisor had a practice of giving gifts to white but not black workers was also thwarted, the University contending that "[i]t doesn't relate to these proceedings" although "[i]t may relate to some claim of race discrimination that is a Title VII case pending in Federal Court...."²⁷ The hearing examiner sustained a similar

²⁵ Tr. xxxiii, p. 227.

²⁶ Tr. xlv, p. 36.

²⁷ Tr. xxii, p. 16.

objection to evidence designed to show that the low income farmers to whom respondent had been assigned were pre-²⁸dominantly black.

During the administrative proceeding the university successfully argued that the hearing examiner should disregard evidence regarding the motives of any of the seven federal defendants who were not extension service employees, arguing that the motives of such non-employees was

irrelevant and not material and not pertinent to this hearing. Plus there is a lawsuit that is separate from this in which those matters may be pertinent and it is not proper for us to go in here what is in that other lawsuit.²⁹

²⁸ Tr. xix, p. 147 ("It is not relevant to this proceeding... This isn't the place to try such a case as the overall.")

²⁹ Tr. xxiv, p. 178. In its Proposed Findings of Fact and Conclusions of Law in the administrative proceeding the University urged that the hearing examiner's responsibility was not to "determine whether Madison County acted properly in its recommendation [that Elliott be dismissed], but to determine the propriety of

The hearing examiner agreed, explaining "I do not have the authority, as I perceive it, to try or to make rulings relating to racial discrimination in this administrative hearing."³⁰

The Administrative Decision

A. The Charges

In a decision issued on April 4, 1983, the hearing examiner found that only three of the ten charges brought by the University were supported by the evidence, and he concluded that they did not justify³¹ respondent's termination. Nevertheless,

³⁰ Tr. xxiv, p. 176; see also Tr. xxiii, pp. 129, 131.

³¹ PA 178. Specifically, the hearing examiner found support for the University's contention that (1) respondent had played golf on one occasion in 1981 during work hours, but that even if he had played golf in earlier years any charges relating to those earlier instances would be stale; (2) that although respondent reimbursed the University, he made long distance personal calls from the office in violation of the University rule, and (3) that the employee was guilty of using

the hearing examiner was of the view that a deteriorating personal relationship between his supervisor and him required respondent's reassignment. PA 180. Despite the exclusioⁿ of relevant evidence, the hearing examiner also concluded that "the employee has failed in his defense ... that the charges against him were a pretext or cover up for racial discrimination...." P.A. 178.

personal calls from the office in violation of the University rule, and (3) that the employee was guilty of using profane language in public on one occasion. However, the hearing examiner found that the University had failed to prove that Elliott engaged in personal business during working hours or that he was insubordinate or guilty of inadequate work performance. The hearing examiner declined to rule on one of the charges. PA 178.

B. The Scope of the Hearing

The hearing examiner's decision made clear that he accepted the University's position that he did not have the jurisdiction to consider claims of racial discrimination:

However, it is the hearing examiner's opinion that this was not the appropriate forum and that he has no jurisdiction under the UAPA contested case provisions, supra to try civil rights actions on the merits as proposed in employee's counter charges. If an action lies, it lies not in state proceedings such as this hearing. Such an action has been filed by employee in United States District Court in Jackson, Tennessee, Robert B. Elliott v. The University of Tennessee, et al. (C.A. No. 82-1014, W.D. Tenn. E. Div.) therefore, this hearing examiner concludes that if jurisdiction exists over the counter issues raised by employee, it exists in that Federal District Court and that employee may not try his civil rights action in this forum.

PA 44-45.

The Final Agency Decision

The hearing examiner's order was appealed to the University. That appeal³² was heard by Mr. Armistead, who affirmed the initial order in a two-page letter that indicated he concurred with the conclusions and that the order was thereby adopted as the agency decision. PA 33-35. The final order was not appealed to state court by either petitioner or respondent.

Respondent's Return To Federal Court

Instead, respondent filed a motion for a TRO and stay of the agency order pending a hearing in court. Dkt Nr. 26 (6th Cir. App. 169).

The motion asserted several new claims which had not been set forth in the original complaint. The motion and accompanying memorandum alleged that the

³² See supra p. 13.

defendants had adopted a number of new practices which not only were discriminatory in purpose but which also violated the order issued by the hearing examiner. These practices included placing on respondent burdens different and greater than those imposed on whites, establishing evaluation criteria calculated to facilitate yet another effort to dismiss respondent, and a failure to establish clear and objective job responsibilities for respondent. The motion and memorandum also directly attacked as unconstitutional the decision of the hearing examiner to order respondent's transfer to another county; respondent complained, inter alia, that the hearing examiner was biased and that the transfer constituted double punishment for alleged misconduct for which he had already been sanctioned years

earlier.³³ The University opposed this motion and filed a motion for summary judgment, asserting, inter alia, that the district court lacked jurisdiction to review the agency findings that could be reviewed only by a state court. For the first time, and totally contrary to the position taken before the hearing examiner, the University argued that the final agency decision was res judicata³⁴ to all claims raised in the complaint. Respondent sought an extension of time in which to respond to this motion, so that

³³ Motion for a Temporary Restraining Order and/or a Temporary Stay, October 24, 1983; Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order and/or a Temporary Stay, October 24, 1983. App. 6th Cir. pp. 169-175; 294-303.

³⁴ Response of the University of Tennessee Defendants to Plaintiff's Motion for TRO, November 3, 1983. App. 6th Cir. pp. 311-320.

he could obtain a transcript of the
35 administrative hearing.

The district court, without and having before it the administrative record and despite the lack of any findings regarding non-University defendants in the administrative decision, granted the motion for summary judgment and dismissed the action as to all defendants. Respondent filed a motion pursuant to Rule 59(e), Fed. R. Civ. P., and he amended that motion, to file a copy of the hearing
36 transcript. The University sought to prevent the district court from examining the transcript by moving that the transcript be stricken from the record; the district court declined to grant that motion. Dkt Nr. 52, 54. The Rule 59

³⁵ Dkt Nr. 32.

³⁶ App. 6th Cir. p. 380; see, entry following Dkt Nr. 51.

motions were denied, and respondent appealed the district court's grant of summary judgment.

Appeal to the Sixth Circuit

The Court of Appeals reversed the judgment of the district court. Relying on this Court's decision in Kremer v. Chemical Construction Co., 456 U.S. 461 (1982), it held that respondent's Title VII claims were not barred by res judicata, because there had been no state court review or judgment. PA 11-13.

The Court of Appeals further held that the district court had also erred in dismissing the claims asserted under 42 U.S.C. § 1981, 1983, 1985, 1986 and 1988. PA 13. The Court first looked to the principles announced in Allen v. McCurry, 449 U.S. 90 (1980) and Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) and found that Section

1738 (28 U.S.C. § 1738) did not require federal courts to defer to unreviewed agency findings. PA 15-16. Finally, its analysis of common law preclusion principles led the Court to hold that according preclusive effect to unreviewed state agency determinations would deprive a plaintiff of a federal remedy. PA 20-22.

SUMMARY OF ARGUMENT

Petitioners seek issue preclusion on an issue, i.e., racial discrimination in employment, that has not been "litigated and decided." Migra v. Warren City School District, 464 U.S. 75 (1984). Respondent has not had "a full and fair opportunity" to litigate this issue. Allen v. McCurry, 449 U.S. 90 (1980). The hearing examiner, an employee of the University petitioner, restricted testimony and excluded evidence concerning discrimination by the University and its agents.

Issue preclusion is simply not applicable to most of the claims in respondent's federal complaint since there has been no decision on those issues.

Traditional principles, as embodied in 28 U.S.C. § 1738, are not applicable to the instant case since that statute, by its terms, only applies to the decisions of "courts" and the agency here does not qualify as a court.

Even if § 1738 generally could be interpreted to apply to administrative agencies, there is "an express or implied partial repeal" of the statute with respect to prior agency decisions when a plaintiff asserts a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. Kremer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982). The legislative history of

that Act makes clear that this repeal exists whether or not the agency is part of the statutory scheme of Title VII.

This Court has indicated that resort to administrative agencies will not prevent an individual from asserting rights under 42 U.S.C. § 1983. See, e.g., Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981).

Whether this case is evaluated on its particular facts or on express and implied limitations on the doctrines of preclusion, the decision of the court of appeals should be affirmed.

ARGUMENT

THE PARTICULAR AGENCY DECISION IN THIS CASE IS NOT ENTITLED TO PRECLUSION UNDER TRADITIONAL PRINCIPLES

Petitioners seek issue preclusion, or collateral estoppel, on the "issue of racial discrimination" and ask this Court to apply traditional principles of full faith and credit to achieve that end. Pet.

³⁷ Br. 26-27. Petitioners begin their analysis by asserting conclusorily that this issue was fully litigated. Pet.Br. ³⁸ at 20. Respondent does not agree that the Court should apply traditional principles

³⁷ Petitioners acknowledge that claim preclusion or res judicata is not available since the hearing examiner lacked jurisdiction. Id. at n.11.

³⁸ As discussed below, different principles apply when the prior determination has been made by an agency and when the subsequent proceeding is a federal action under Title VII, 42 U.S.C. § 2000e et seq or one of the 1871 Civil Rights statutes 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988.

of preclusion, but submit that, if such principles were applicable, the analysis should begin by examining, in fact, what was litigated and decided in the agency and how fully those issues and claims were presented to and considered by that agency. This analysis shows that traditional principles mandate that preclusion should not apply to this case. It is a well-settled principle that

[C]ollateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case. Montana v. United States, [440 U.S. 147, 153 (1979)], Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, [402 U.S. 313, 328-329 (1971)].

Allen v. McCurry, 449 U.S. 90, 95 (1980). Moreover, it applies only to matters that have been both "litigated and decided". Migra v. Warren City School District, 465 U.S. 75, 77 n.1 (1984). While the peti-

tioners would like the Court to accept their assurance that the issue of racial discrimination was fully litigated, they fail to even confront the second element. Nowhere in petitioners' brief will the Court find an assertion that the issues raised by respondent's federal complaint were actually decided by the hearing examiner. Instead, petitioners assert, in a carefully chosen phrase repeated some 20 times in their brief, only that the issues in the federal complaint were "fully and fairly litigated" in the administrative proceeding. (Emphasis added).³⁹ If an issue were only litigated in, but never actually

³⁹ Pet. Br. i, iii, 12, 13, 15, 16, 20, 27, 31, 37, 38, 39, 41. Consistent with this carefully chosen language, the questions presented proposed by petitioners concern whether full faith and credit apply to "issues fully and fairly litigated before a state agency" not whether full faith and credit apply to issues litigated before and decided by a state agency.

resolved by, the administrative process, then issue preclusion would of course be improper; there can be no collateral estoppel if the matter in question was never actually adjudicated.

This striking omission is far from
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inadvertent. In the district court and in
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the court of appeals respondent repeatedly and expressly asserted that the hearing examiner had refused to decide the issues presented in his federal complaint. Although petitioners themselves appear to understand that issue preclusion is inappropriate for issues that were not
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actually adjudicated, petitioners in the

⁴⁰ Plaintiff's Memorandum in Support of Motion for TRO, p. 21; Plaintiff's Response to Defendant's Amended Motion for Summary Judgment, p. 3; Memorandum in Support of Plaintiff's Motion for New Trial, pp. 1, 2, 4.

⁴¹ Brief for Appellant, p. 2.

⁴² Pet. Br. 35, 38, 42.

court of appeals, as here, carefully and consistently declined to assert that the hearing examiner had in fact decided all or most of the questions raised by the
43
federal complaint.

As we set out in detail below, there are two distinct reasons for the apparently curious phrasing of petitioners' brief. First, the respondent was prevented from having a full and fair opportunity to litigate. Second, the hearing examiner in the administrative proceeding clearly did not decide almost any of the issues raised by the federal

⁴³ Brief for Defendants-Appellees, pp. 6 (plaintiff "raised" his discrimination claims in the administrative hearing), 17 (discrimination issues "litigated" in administrative hearing), 18 (plaintiff "raised" his claims in the administrative hearing), 19 (discrimination claims "litigated" in the administrative process).

complaint; on the contrary, the examiner was quite explicit in refusing to decide those issues.⁴⁴

A. Opportunity to Litigate

Throughout the administrative hearing counsel for petitioners repeatedly and successfully argued that only the federal court should decide the discrimination issues, and that the hearing examiner for that reason should not admit evidence regarding or undertake to resolve those issues. Although petitioners in this Court insist that respondent was entitled to litigate his discrimination claims in the administrative hearing, petitioners

⁴⁴ The district court opinion on which petitioners rely did not hold or suggest that the issues raised by the federal complaint had actually been decided in the administrative hearing. Rather, the district court observed only that discrimination issues had been "litigated in the UAPA proceeding". PA 32.

successfully argued precisely the opposite when they were before the hearing examiner. Under these circumstances the application of issue preclusion is clearly inappropriate.⁴⁵

Many of the issues raised by respondent's federal claims were "litigated" in the administrative hearing only in the sense that, despite the hearing examiner's repeatedly expressed refusal to admit or consider most evidence of discrimination, respondent's counsel persisted in making systematic and generally unsuccessful

⁴⁵ Issue preclusion is not appropriate "because the party sought to be precluded, as a result of the conduct of his adversary ... did not have an adequate opportunity ... to obtain a full and fair adjudication in the initial action. Restatement (Second) of Judgment (1980 § 28(5)). Having acted to deprive Mr. Elliott of a full and fair opportunity to litigate the issue of discrimination, the University should not be permitted to rely on the preclusive effect of the agency determination.

offers of proof. Petitioners' assertion with regard to the administrative hearing that the discrimination issues "hardly could have been litigated more fully" (Pet. Br. 20) is somewhat difficult to reconcile with what actually occurred in that proceeding.

The petitioners claim of issue preclusion is based merely on two circumstances: (1) The length of the administrative proceeding and (2) the Administrative Law Judge's assertion that he addressed the issue of "racial discrimination." Neither of these circumstances are analytically supportive of preclusion. The length of the proceeding might be of some relevance if the issue before the hearing examiner was racial discrimination in employment. Here, however, the focus of the hearing and of the examiner was the work performance and job behavior of

respondent.⁴⁶ Almost of the testimony was directed toward these issues and respondent defended himself specifically against charges in this area.⁴⁷ The petitioners would like to give the impression that the extent of the record herein conclusively shows that respondent had a full and fair opportunity to litigate the issue of racial discrimination. Pet. Br. 29-21. This simply ignores the fact that very little of the testimony or the hearing

⁴⁶ "The purpose of this hearing was to determine whether or not the employment of Madison County Associate Agricultural Extension Agent, Robert B. Elliott ... should be terminated for alleged inadequate work performance and inadequate and/or improper job behavior." PA 37.

⁴⁷ "Employee produced some 90 witnesses who testified relative to the services he had performed for small farmers and others in Madison County from time he first came to the county up to and including the date of their testimony during the hearing." PA 114.

examiner's order even addressed the⁴⁸ question of racial discrimination.

More importantly, the hearing examiner agreed with the petitioners that he had no jurisdiction over the issue of racial discrimination and that a proceeding under the UAPA contested cases provisions was an improper forum to raise such issues. PA 44. It was this view which led him to restrict testimony and exclude evidence of racial discrimination.

A full and fair opportunity to litigate embodies two components: procedural fairness and substantive adequacy. The hearing conducted by the agency here falls short in both areas. The petitioners attempt to avoid these deficiencies

⁴⁸ For example, while the Initial Order comprises almost 150 pages in the appendix, fewer than seven pages (PA 171-177) comprise the hearing examiner's views on the racial discrimination issue.

cies by reference to the outer trimmings of the hearing, knowing full well that the actual conduct of the hearing belies their assertion. For example, the petitioners point out the trial-type rights provided by the UAPA, but fail to bring to this Court's attention (1) the University's repeated successful attempts to restrict evidence on racial discrimination during the hearing and (2) its subsequent attempts to keep the hearing transcript (and thus the inadequacy of the hearing on the issue of discrimination) from the district court. The UAPA may have provided procedural rights but the University succeeded in preventing those theoretical rights from being translated into a full and fair opportunity to litigate.

B. The Decision of the Hearing Examiner

The actual decision of the hearing examiner generally adhered to the view successfully advanced by the university during the hearing itself regarding the irrelevance of discrimination issues. The hearing examiner expressly refused to decide discrimination issues "unrelated to the proposed termination of Elliott", explaining that he did not have "jurisdiction in this proceeding to try a civil rights case on the merits" and that the "proper forum" for such claims was "the federal court in which Elliott has filed his federal lawsuit." (PA 171). The only discrimination issue which the examiner did deem relevant to the administrative proceeding was whether "the employer's action in bringing charges against the employee ... were based on ... racial discrimination." (PA 177).

The examiner's decision circumspectly avoids deciding, or even addressing, almost all the discrimination and retaliation issues raised by respondent's federal complaint. First, the examiner expressly refused to issue any ruling regarding actions or motives of the seven federal defendants who were not AES employees, noting that such matters were "outside the parameters of this hearing." (PA 174). Second the examiner's opinion is devoid of any reference to respondent's allegations that the extension service engaged in systematic discriminatory practices, such as servicewide discrimination in hiring, compensation, assignments, promotions, training, appointment of supervisors, or program administration. Third, the examiner's opinion, with one narrow exception,⁴⁹ contains no discussion

⁴⁹ The hearing examiner concluded that

whatever of respondent's claims that extension service officials had retaliated against him because of his civil rights activities; indeed, the opinion does not expressly address the issue of whether the charges filed against respondent had been the result of retaliation, as distinguished from racial prejudice. Fourth, the examiner's opinion does not, of course, address any of petitioner's subsequent claims that the defendants engaged in new discriminatory practices after the issuance of that opinion.

The one issue that the hearing examiner's opinion does attempt to address is whether AES officials actually believed

Shearon's order prohibiting Elliott from visiting golf courses during working hours was not issued in retaliation for Elliott's efforts to integrate all-white golf courses. (PA 172). The examiner's opinion does not address the question of whether other actions by Elliott's supervisors might have been so motivated.

respondent had violated the service's rules and standards, or had knowingly filed false charges for racial reasons. The hearing examiner concluded that the extension service defendants acted on the basis of what they "perceived as improper and/or inadequate behavior." (PA 177). The federal complaint alleged, however, that the proposal to dismiss respondent was initiated, not by AES employees, but by the white members of the Madison County Agricultural Extension Service Committee, allegedly in collusion with the private defendants Korwin and Murray Truck Lines. Thus the hearing examiner's opinion is not dispositive of the federal claim that the dismissal action was tainted by a discriminatory purpose, but merely exonerates some but not all of the federal defendants of one aspect of that charge.

Although the hearing examiner repeatedly states that he cannot resolve any discrimination issue other than whether there was a racial purpose behind the University's charges, the examiner's opinion inexplicably contains several pages discussing allegations of discrimination in incidents that were not the subject of those charges (PA 172-77). This apparent inconsistency has a simple explanation. Following the conclusion of the administrative hearing, the University submitted Proposed Findings of Fact and Conclusions of Law which asserted that the examiner had no jurisdiction over discrimination claims regarding incidents other than those leading to the particular charges against respondent. The University, however, also included in that pleading proposed findings regarding a dozen incidents, most of which were not

the subject of the pending charges, although expressly noting with regard to at least one of them that the claim was "unrelated to the disciplinary charges in this case."⁵⁰ The portions of the hearing examiner's opinion dealing with such unrelated incidents are taken directly from the university's proposed findings; the hearing examiner discusses exactly the same issues, in virtually the same order, often using language or sentences lifted⁵¹ verbatim from the university's draft.

This portion of the hearing examiner's opinion raises several issues that were not addressed below. First, if, as both the examiner and the university at times maintained, resolution of these separate discrimination claims was

⁵⁰ Proposed Findings of Fact and Conclusions of Law, p. 79.

⁵¹ Compare, id. at 70-79 with PA 172-77.

irrelevant to the charges actually before the examiner, then any adjudication of those claims would be gratuitous and not binding in a subsequent proceeding. Second, in a number of instances the opinion recites there is "no evidence" of discrimination as to a claim which the examiner had dismissed as irrelevant during the hearing itself, and regarding which the examiner had thus refused to admit evidence.⁵² Clearly, respondent did not have a full and fair opportunity to litigate such issues. Third, it is clear that the legal standards applied by the hearing examiner in rejecting what he characterized as respondent's "affirmative defense" were not the same as the standards that would be applied in a Title VII

⁵² Compare PA 173 (no evidence of salary discrimination) with Tr. xxxiii p.3 (evidence of salary discrimination excluded as irrelevant).

or Section 1983 case. If the administrative preclusion were to be accorded effect in a Title VII or Section 1983 action, the lower courts would have to determine on remand whether the narrow issues that were actually resolved by the hearing examiner should be given such an effect in light of the peculiar history of the administrative proceeding.

C. The Tennessee UAPA Process

The concepts of res judicata and collateral estoppel rest on notions of finality, that issues and claims, once fully litigated and properly decided, should not be subject to further adjudication. Montana v. United States, 440 U.S. 147, 154 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5 (1979). Neither doctrine is rigid and each may be

shaped to assure fairness. See e.g., Montana, supra, 440 U.S. at 164 n.11 ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in prior litigation"); Parklane Hosiery, supra, 439 U.S. at 330-31. This concern for fairness is most often expressed in the phrase "full and fair opportunity to litigate." Courts of necessity have sought to define this phrase by asking more specific questions. In Parklane Hosiery, for example, this Court suggested, inter alia, the following inquiries: (1) the monetary incentive of the party in the prior litigation; (2) the existence of prior inconsistent judgments; (3) the availability of procedural safeguards in the prior proceeding. The Court concluded that trial courts should exercise "broad discretion" in applying

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preclusion. 439 U.S. at 331. Decisions by administrative agencies pose a special problem. Until recently, administrative agency decisions have not been accorded preclusive effect. Not until 1966 did this Court squarely hold that decisions by administrative agencies could in appropriate circumstances preclude judicial litigation of the same issues. United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966). Because of the enormous variations in the expertise, independence, authority, procedures and responsibilities of administrative agencies, and of the issues that come before them, the appropriateness of preclusion, and the degree of deference

⁵³ While the decision in Parklane Hosiery involved the application of offensive collateral estoppel, the Court noted that there was "no intrinsic difference" between offensive and defensive collateral estoppel. 439 U.S. at 331 n.16.

that may be warranted to a particular agency determination, necessarily depends on the circumstances of each case:

The reasons behind the doctrine [of res judicata] as developed in the court system are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others. As a matter of principle, therefore, the doctrine should be applied to some administrative proceedings, modified for some, and rejected for others.... [T]he choice is not between taking all or none of the traditional doctrine of res judicata; the doctrine may be relaxed or qualified in any desired degree.... In a great many cases the courts have applied a relaxed doctrine of res judicata to administrative action.

2 K. Davis, Administrative Law Treatise § 18.10 (1972). In deciding whether to apply preclusion to a particular agency, or kind of agency, a court should look to how well the attributes of that agency serve the interests of fairness.

Although this Court has not had occasion since Utah Construction to consider the appropriateness of applying res judicata to particular agency determinations, the Court has repeatedly addressed the closely related question of whether prior arbitration decisions should preclude litigation in federal court of the very issues resolved by the arbitrator. McDonald v. City of West Branch, 466 U.S. 284 (1984); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In deciding whether to give res judicata effect to such arbitration decisions, the Court weighed the importance that Congress attached to judicial enforcement of the claims at issue, and the adequacy of arbitration as a substitute for judicial proceedings. McDonald, 466 U.S. at 289-90. The

particular criteria applied in McDonald, Barrentine, and Alexander, we urge, are among the appropriate factors for deciding whether to give preclusion effect to a state agency determination.⁵⁴ When applied to the UAPA proceeding in this case, these factors dictate a non-application of the preclusion rules.

1. Lack of Expertise

First, the administrative law judge did not have the required expertise in employment law.⁵⁵ Because the UAPA pro-

⁵⁴ McDonald discusses these factors in the context of creating a preclusion doctrine outside of § 1738. Respondent submits that § 1738 does not apply to agency decisions (see pp. 77-83), but believe that these criteria would also be relevant to a determination of the extent of deference which the full faith and credit statute would require.

⁵⁵ As with arbitration, there is no requirement that the hearing examiner be a lawyer. See McDonald, 466 U.S. at 290 n.9. A claim may be heard by either a "hearing officer" or an "administrative law judge." Tenn. Code Ann. 4-5-301. Only the administrative law judges are required

cedure are external to the state FEP scheme, there is not the appreciation or affinity for the issues that would be raised in either state or federal causes of action alleging discrimination in employment. Allowing federal rights to be adjudicated in agency proceedings, particularly those outside the FEP framework, creates a serious risk that these rights will be inadequately protected. A clear example of how a lack of expertise can adversely effect one's rights is the hearing examiner's handling of respondent's charges of racial discrimination.

The petitioners contend that the hearing examiner properly considered Mr. Elliott's charges of race discrimination

to be attorneys. In the instant case, the hearing examiner was in fact a member of the bar.

as a pretext under Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973) when he purported to analyze them as an affirmative defense to the UAPA charges. See, e.g., Pet. Br. 40-41. This contention is simply wrong and shows clearly why courts and Congress have traditionally been reluctant to give preclusive effect to determinations by administrative agencies. Because the hearing examiner lacked the expertise to apply federal law, he never formulated or analyzed the issues as a federal court would have. McDonnell Douglas discusses the application of pretext to claims of discrimination. In that case the plaintiff had made out a prima facie of racial discrimination and the defendant had articulated a reason for its treatment of the plaintiff, namely

that the plaintiff had engaged in unlawful and disruptive acts against it. This Court held that "the inquiry must not end there" and that a reason is not acceptable unless it "is applied alike to members of all races." 411 U.S. at 804. "Especially relevant to such a showing would be evidence that white employees involved in acts against [the employer] of comparable seriousness ... were nevertheless retained." Id. See also, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Not only did the hearing examiner fail to apply this rule of law, he specifically excluded comparative treatment evidence. The analysis of two charges is particularly instructive here. Mr. Elliott was charged with violating work rule #22 because he charged [though later paid for]

personal telephone calls to the office. The examiner found that it was common for employees to use University telephones for personal calls but held that actions of other employees was not relevant to issues before him, but might be considered in evaluating disciplines. PA 95.⁵⁶ The examiner therefore found that, as a matter of fact, Mr. Elliott had used University telephones for personal calls and had⁵⁷ consequently violated the rule.

Similarly, the University charged Mr. Elliott with violating work rule #13 in

⁵⁶ The examiner restricted the presentation of evidence on the practice with respect to personal telephone calls.

⁵⁷ The hearing examiner apparently interpreted pretext to mean that the University had accused Mr. Elliott of violating University rules when he, in fact, had not done any thing contrary to the rules. Since he found that Mr. Elliott had violated the rules, the charges were not pretextual.

that he used abusive language while working. PA 160. Again the examiner found that proof of the rule's non-application to other agents was irrelevant:

"It was undenied that other extension agents have used profanity while working with or among extension service clientele without reprimand."

PA 165-66). The only relevant inquiry to the hearing examiner was whether Mr. Elliott could be said to have violated the rule and, the circumstances notwithstanding, the examiner felt compelled to find that Mr. Elliott, in fact, had used⁵⁸ profanity. PA 166.

In addition to excluding comparative treatment evidence on these specific charges, the examiner also excluded

⁵⁸ Specifically, Mr. Elliott was found to have said "wait a goddamn minute, wait a goddamn minute, wait a goddamn minute" in response to Mr. Coley's referring to a black 4-H member as "nigger." A 85, A 165.

evidence of the University's approach to allegations of discrimination and its policies and practices with respect to minority employment. A full and fair opportunity to demonstrate pretext requires that a plaintiff be allowed to present evidence of this kind:

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minorities in employment.

McDonnell Douglas, 411 U.S. at 804-805.

The hearing examiner excluded such evidence as irrelevant to the issues before him.

The findings on racial discrimination, even if this had been an appropriate

forum, would therefore not be entitled to credit because the hearing examiner applied an erroneous view of the law. The district court should therefore have disregarded the conclusions drawn by the hearing examiner and conducted its own inquiry into the issue.

2. Lack of Authority

The hearing provided here also falls short on the second McDonald factor since the examiner had no authority to enforce Title VII or §1983 or to decide issues pertaining to those statutes. The examiner continued to admit his lack of jurisdiction. Indeed it is grounds for reversal that a decision is made "[i]n excess of the statutory authority of the agency."⁵⁹ Tenn. Code Ann. §4-5-322(h)(2).

⁵⁹ In general, issue preclusion should not be available where an agency acts beyond its statutory authority:

If an agency nonetheless presumes to

Proper jurisdiction is a necessary element in the application of preclusion to the decisions of agencies. In Utah Construction, supra, this Court made clear that issue preclusion might be available only when an agency decided issues "properly before it." ⁶⁰ 384 U.S. at 422.

decide an issue beyond its jurisdiction, courts are likely to apply vigorously the general principle that preclusion is defeated when strong policies underlie the lines that limit the authority of the tribunal that made a prior decision.

18 C. Wright, A. Miller & Cooper, Federal Practice and Procedure, Jurisdiction, ch 13 §4475 at 768 (1981); see also Restatement (Second) of Judgments, § 83, comment d (1981).

⁶⁰ As the Court observed in Thomas v Washington Gas Light Co:

[T]he critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.

(448 U.S. 261, 281-82)(plurality opinion

See e.g., Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940) ("[H]ere the authority of the Commission is clear. There can be no question that it was authorized to make the determination.")

3. Lack of Objectivity

The third factor is even more compelling here than in an arbitration proceeding. In arbitration, a third party, the union, has control over how a grievance is presented. Here the adverse agency has total control over how the hearing is conducted. Tenn. Code Ann. § 4-5-301. The agency selects the person who hears the case and retains the right

of Stevens, J.). The Court proceeded to hold that "full faith and credit need not be given to determinations that [an agency] had no power to make." Id. at 283. Thus the District of Columbia was not required to give full faith and credit to a determination by the Virginia Workers' Compensation Commission.

to accept, reject or modify the findings made by that person. This exercise of power and control by the agency severely jeopardizes an employee's opportunity to obtain remedy for the deprivation of his federal constitutional and statutory rights.

The Court in McDonald was concerned that the union had control over the "manner and extent to which an individual grievance is presented" and that its interests might not be identical to, or compatible with, the interests of the employee. How much more incompatible is the interest of the employee here and the agency. The very entity charged with improper behavior, act here as the final arbiter.

The University did nothing to temper the effect of the process. Under Tenn. Code Ann. § 4-5-301(d) it could have

requested that the case be heard by an independent administrative law judge from the office of the Secretary of State. Instead defendant Armistead named his assistant, Mr. Pentecost, the hearing examiner. Armistead advised Pentecost in advance that the defendant agency did not intend to be bound by Pentecost's decision, but would itself make the final decision regarding the dispute between the University and the respondent. This

⁶¹ Letter of W.W. Armistead to B.H. Pentecost, March 5, 1982, p. 2:

"When you have arrived at a decision, you will reduce your findings to writing. These findings shall be in the form of a proposed decision... You shall forward the original of the proposed decision to my office along with the file in this matter.... I shall then review your proposed decision along with the record as a whole before I render the final decision for the agency."

(Emphasis added).

procedure violated a fundamental tenet of due process that no one be made judge of his own case. Tumey v. Ohio, 273 U.S. 510 (1927).

4. Lack of Procedural Safeguards

As shown above, the procedural rights provided for in the Tennessee UAPA can also be illusory. The hearing examiner, because of the limits of his authority and expertise may, as here, exclude evidence as outside his jurisdiction or irrelevant to the inquiry before him.

In addition, the bias in the process raised serious due process questions. Petitioners contend that the "state proceedings were conducted in virtually the same manner as a trial in ... federal

court" (Pet. Br. 15) is not entirely correct. In a federal court proceeding none of the defendants could have sat as the judge, or would have been permitted to designate as a hearing officer an individual who was either an employee of the defendant University or an immediate subordinate of one of the individual defendants. Neither res judicata nor full faith and credit can be invoked against a party who did not receive due process at the earlier proceeding. Whatever disputes may exist regarding the requirements of the due process clause, it certainly precludes a party from sitting as a judge in a case in which it has a significant interest. Tumey v. Ohio, 273 U.S. 510 (1927). Tumey held that the conviction of a defendant by a judge who was to receive part of the fine violated due process because the judge has "a direct, personal,

substantial pecuniary interest in reaching a conclusion against [Tumey]." 273 U.S. at 523. The judge in Tumey was entitled to only \$12 from Tumey's fine; in the instant case the defendants, including Armistead and the University, faced a potential judgment of \$1,000,000 if respondent's discrimination claims were sustained. Although Pentecost was not himself a named defendant in the federal action, the likelihood that he would be influenced by the very substantial financial interest of both his employer and his immediate supervisor was sufficiently great as to violate due process as well.

II. THE FULL FAITH AND CREDIT STATUTE, 28 U.S.C. §1738, IS NOT APPLICABLE TO THE UNREVIEWED DECISIONS OF ADMINISTRATIVE AGENCIES

In arguing that full faith and credit applies, the petitioners fail to distinguish between the coverage of the full faith and credit clause of the Constitution, article IV §1, and the federal full faith and credit statute, 28 U.S.C. §1738. While the former applies to the "Judicial proceedings of every other state," the latter applies only to the "judicial proceedings of any court of any State." (emphasis added). The statute by its plain and unambiguous terms does not require federal courts to give preclusive effect to unreviewed agency determinations.

The literal reading of section 1738 is strongly supported by past decisions of this Court. In Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), the Court continually emphasized this dividing line for the statute's application. First, in describing the critical issue in that case the Court held:

No provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action.... While we have interpreted the "civil action" authorized to follow consideration by federal and state administrative agencies to be a "trial de novo," Chandler v. Roudesh, 425 U.S. 840 (1976), ... neither the statute nor our decisions indicate that the final judgment of a state court is subject to redetermination at such a trial.

Id. at 469-70 (emphasis in original). This emphasis on the word "court" was expanded on in a footnote accompanying the text:

Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC. Since it is settled that

decisions by the EEOC do not preclude trial de novo in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a state's own courts.

⁶²
Id. at 470 n.7. This distinction drawn by the Court is consistent with the limitation of 28 U.S.C. §1738, which, by its express terms only "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." (emphasis added). Id. at 466. See also cases cited in n.6 accompanying text; id. at 487 (Blackmun, J. with Brennan & Marshall, JJ., dissenting) (recognizing distinction made by major-

⁶² See also n.8 where the Court emphasizes that the deferral provisions of Section 706(c) of Title VII, 42 U.S.C. §2000e-5(c) refers to "agencies.".

ity); id. at 508-09 (Stevens, J., dissenting) (same). See also Allen v. McCurry, 449 U.S. 90, 104 (1980) (legislative history of Section 1983 does not preclude giving "binding effect to a state-court judgment") (emphasis added); Migra v. Warren City School District, 465 U.S. 75, 84 (1984) ["P]etitioner's state-court proceeding in this litigation has ... preclusive effect) (emphasis added).

Similarly, the Court in McDonald v. City of West Branch, 466 U.S. 284 (1984), summarily rejected a suggestion that section 1738 had any application to an arbitration proceeding conducted by a municipality, noting that "the plain language" of the statute was limited to actions of state legislatures and state courts. Id. at 288 n.7. None of the lower court decisions relied on by petitioners suggest that section 1738

could somehow be applied to the actions of an administrative agency; on the contrary, those opinions which actually reach that issue hold precisely the opposite.⁶³

The petitioners nevertheless provide the Court with no clearly articulated justification for deviating from this "plain language of §1738." McDonald, supra, 466 U.S. at 287. Indeed the petitioners seek to obscure the difference between the Constitutional clause and the statute. Both are spoken of together and the petitioners fail to note the distinct language of the statute. See, e.g., Pet. Br. 23. The omission by the petitioners

⁶³ Buckhalter v. Pepsi-Cola General Bottlers, 768 F.2d 842, 849 n.4 (7th Cir. 1985); Parker v. National Corporation for Housing Partnerships, 619 F. Supp. 1061, 1064 (D.D.C. 1985). Accord, Elliott v. University of Tennessee, 766 F.2d 982, 992 (6th Cir. 1985); Ross v. Communications Satellite Corp., 759 F.2d 355, 361 n.6 (4th Cir. 1985); Moore v. Bonner, 695 F.2d 799, 801 (4th Cir. 1982).

is particularly informative since it ignores the distinction made in the Court's recent decisions in Kremer, Migra and Allen, all of which involve state court action. Moreover, the opinion of the Sixth Circuit specifically relied on this plain language in holding § 1738 inapplicable to respondent's section 1983 claim and the same dividing line was recognized by the court in Buckhalter v. Pepsi-Cola General Bottlers, supra, 768 F.2d at 849.⁶⁴

Although the federal courts are not required either by the constitution or by statute to give res judicata or collateral estoppel effect to decisions of state agencies, the courts may at times apply a

⁶⁴ The petitioners had originally asserted that this case supported their position (Pet. for Certiorari at 8-9) but now fail to recognition that court's reading of § 1738 with their present position.

judicially fashioned rule of preclusion. McDonald, supra, 466 U.S. at 288. The appropriateness of such a rule depends, at least in part, on the nature and basis of the federal claim involved. Accordingly, we discuss separately in the sections which follow the appropriateness of such a judicial preclusion rule under Title VII and under section 1983.

III. TITLE VII GUARANTEES A PLAINTIFF A RIGHT TO A JUDICIAL DETERMINATION OF HIS CLAIMS REGARDLESS OF ANY ADMINISTRATIVE DECISIONS REGARDING THOSE CLAIMS

The Court has already held in Kremer v. Chemical Construction Corp., that the prior determination of a section 706(c) deferral agency will not preclude either party from obtaining de novo judicial

determinations in federal court.⁶⁵ Petitioners do not challenge this holding, but rather acknowledge that the language of section 706 of Title VII can be considered "an implied repeal of the full faith and credit statute." Pet. Br. 34. The petitioners nevertheless seek to avoid the holding in Kremer by contending 1) that Kremer was not meant to apply to agencies acting in a "judicial capacity" and (2) that since the University of Tennessee is not a deferral agency, the implied repeal does not apply. Neither of these assertions withstands analysis.

The first contention simply ignores the Court's unequivocal statement in Kremer that "unreviewed administrative determinations by state agencies" should

⁶⁵ Section 706(c) requires the EEOC to give limited deferral to adequate state agencies.

not be given preclusive effect. 456 U.S. at 470 n.7. No restriction or qualification is placed on this rule. The petitioners' reliance on footnote 26 in Kremer is misplaced. They assert that the reference to United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), supports their position since the Court there stated that principles of res judicata may apply to the decisions of administrative agencies acting in a "judicial capacity." Id. at 422. A careful reading of Kremer, however, demonstrates that the petitioners read too much into this footnote. First of all, in holding that unreviewed state determinations were not entitled to preclusion, the Court cited four lower court decisions. Garner v. Giarusso, 571 F.2d 1330 (5th Cir. 1978); Batiste v. Furnco Constr. Corp., 503 F.2d 447 (7th Cir. 1974), cert.

denied, 420 U.S. 928 (1975); Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972). In three of these cases (Garner, Batiste and Cooper), the lower court held that preclusion was not appropriate even though the agency had full enforcement authority and provided for adjudicative procedures.

Secondly, the Court's discussion of Utah Construction occurs in the section concerning due process requirements of reviewed agency determinations. Thus the adjudicative capacity of the agency is discussed in an entirely different context from the Court's discussion of the non-preclusive effect of agency decisions.

Third, the petitioners also ignore the context of the statement quoted from Utah Construction. In Part II of that

opinion, this Court clearly states that no deference is due an agency which does not have jurisdiction to decide an issue:

Of course, if the findings made by the Board are not relevant to a dispute over which it has jurisdiction, such findings would have no finality whatsoever.

384 U.S. at 419 n.15 (emphasis added). Since the Title VII issues were not "properly before" the hearing examiner, preclusion principles do not apply to his findings.

Finally, the petitioners ignore this Court's decisions in Alexander and Chandler which establish the right to trial de novo for Title VII causes of action. It is impossible to reconcile this right with the rule of preclusion urged by petitioners.

The petitioners argument with respect to the preclusive effect of non-deferral agency decisions is similarly flawed.⁶⁶ The argument is based on 706(b)'s requirement that the EEOC give "substantial weight" to deferral agencies. The petitioners contend that the failure to indicate what weight should be given to non-deferral agencies indicates Congress' intent to give preclusive effect to such agencies. Rather than requiring greater deference, the unreviewed decisions of agencies outside of the Title VII scheme are entitled to less, if any, weight.

Both the language and reasoning of Kremer apply with even greater force to agencies acting outside of the Title VII enforcement scheme as they do to deferral

⁶⁶ Petitioners expressly limit their argument to the effect of decisions by non-deferral agencies "acting .. outside the Title VII enforcement scheme." Pet. Br. II, 31.

agencies. Kremer holds broadly "the 'civil action' authorized to follow consideration by federal and state agencies to be 'trial de novo'" (quoting Chandler v. Roudebush, 425 U.S. at 844-45). 456 U.S. at 469. As the Court noted, the "substantial weight requirement" was added to Title VII in 1972, not because the EEOC was giving too much weight to deferral agency decisions, but because it was affording them too little significance. 456 U.S. at 470 n.8.

It was the intent of Congress that the deferral provision would insure that EEOC and federal courts would give proper deference to proceedings necessarily invoked through Title VII. It resulted from a careful balancing of the de novo requirement in Title VII and the important role played by state and local FEP agencies in the implementation of Title

VII. At the same time there was "a Congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). The legislative history of both the 1964 Act and the 1972 amendments shows that Congress was concerned with the effect of Title VII on state fair employment statutes. While there was disagreement on the weight to be given to state proceedings, there was general agreement that the federal scheme should only defer to "adequate" state systems. Senator Humphrey, one of the drafters of the 1964 deferral provision, recognized that adequate state fair employment agencies were an important element in enforcement and stated that "[t]he most important changes give greater recognition to the

role of state and local action against discrimination." 110 Cong. Rec. 12,707⁶⁷ (1964). Senator Clark underscored the⁶⁸ limits of this deference. In contrast, Title VII was not intended and did not apply to rights and obligations pursued under other federal and state statutes. Alexander v. Gardner-Denver, 415 U.S. at 48-49 and n.9.

⁶⁷ See, also, 110 Cong. Rec. 7205 (1964) (remarks of Sen. Case); id. at 2728 (amendment proposed by Rep. McClory); id. at 7214 (interpretive memorandum of Senators Case and Clark); id. at 10,520 (remarks of Sen. Carlson).

⁶⁸ "It is important to note that Title VII is so drafted that the States and the Federal Government can work together.... [T]he State and the municipal agencies will continue to operate, and State laws will continue to in force, except where they are inconsistent with Title VII ... [T]itle VII meshes nicely logically, and coherently with the state and city legislation already in existence ... [b]ut where there is no state or local law, a Federal law is essential."

110 Cong. Rec. 7205 (1964).

The 1972 amendments similarly were addressed only to giving proper deference to adequate state fair employment agencies.⁶⁹ Congress again stated its intent that Title VII claims should be determined by courts and that its provisions not "affect existing rights granted under other laws." S. Rep. No. 92-415, p. 24 (1971).

In adopting the 1972 amendments to Title VII Congress considered at length proposals to give the EEOC power to issue cease-and-desist orders, subject to substantial evidence review in federal courts. Although these proposals would have given EEOC determinations far less

⁶⁹ Section 706(b) provides that EEOC should give "substantial weight" to findings and orders "in proceedings commenced under State or local law pursuant to [the deferral provision]. Deferral under Section 706(c) only occurs if there is an adequate state agency as determined by EEOC.

weight than petitioners now urge for certain state agency decisions, Congress ultimately refused to impose such a limitation on judicial consideration of Title VII claims.

The concerns that led Congress to refuse to limit judicial reconsideration of EEOC determinations are fully applicable to any proposed limitation of judicial resolution of claims previously considered by state agencies. Senator Dominick, the leading opponent of cease-and-desist authority for EEOC, argued that the final resolution of Title VII claims was a sensitive matter that belonged in the courts rather than any agency:

Determination of employment civil rights deserves and requires non-partisan judgment. This judgment is best afforded by Federal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render decisions in a climate

tempered by judicial reflection and supported by⁷⁰ historical judicial independence.

If, as petitioners urge, the decisions of non-deferral agencies are binding on federal courts, then actions of such non-deferral agencies would be of far greater importance than actions of section 706(c) deferral agencies or of the EEOC itself. Kremer emphasized that it was not "plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC", noting that even EEOC determinations "do not preclude a trial de novo in federal court..." 456 U.S. at 470 n.7. It is even more implausible to suggest that

⁷⁰ S. Rep. 92-415, p. 85 (1971). Similar concerns were expressed in the minority views appended to the House Report. H.R. Rep. 92-238, pp. 58-63 (1971).

Congress, having specifically delineated the particular state agencies to which the EEOC should initially refer complaints and having refused to extend the powers of EEOC, intended to attach greater significance to the determinations of those state agencies whose lesser expertise or remedial authority made deferral inappropriate. The hearing under Tennessee's UAPA, being outside the enforcement scheme of Title VII, is thus not intended to affect or be affected by the provisions of Title VII. Analytically such a proceeding should be treated the same as the arbitration proceeding in Alexander v. Gardner-Denver Co, 415 U.S. 36 (1974), for preclusion purposes.⁷¹

⁷¹ The Court in Kremer noted that one of the important differences between an arbitration and state fair employment proceedings is that the former is not part of Title VII's system:

[U]nlike arbitration hearings under

**IV. PRIOR STATE AGENCY DETERMINATIONS
HAVE NO PRECLUSIVE EFFECT IN SECTION
1983 ACTIONS**

A. Prior Decisions of This Court

Six members of this Court have already expressed the view that state agency determinations should not be treated as preclusion in section 1983 cases.⁷² In Moore v. East Cleveland, 431 U.S. 494 (1977), the Chief Justice asserted that exhaustion of state adminis-

collective-bargaining agreements, state fair employment practice laws are explicitly made part of the Title VII enforcement scheme. Our decision in Gardner-Denver explicitly recognized the 'distinctly separate nature of these contractual and statutory rights.'

Kremer, supra, 456 U.S. at 477.

⁷² The complaint in this action raised claims under several different reconstruction era civil rights statutes. Petitioners apparently assume, as do we, that the preclusive effect of a prior state agency determination is the same under all of these statutes.

trative remedies would not preclude a de novo consideration of constitutional claims in federal court

because state administrative agency determinations do not create res judicata or collateral estoppel effects. The exhaustion of state administrative remedies postpones rather than precludes the assertion of federal jurisdiction.

431 U.S. at 524 n.2 (dissenting opinion). In Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), Justice Powell in an opinion joined by the Chief Justice, also expressed the view that exhaustion of state administrative remedies "does not defeat federal-court jurisdiction, it merely defers it." 457 U.S. at 532. (dissenting opinion). In Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981), four members of the Court expressed the view that the petitioners in that case would not have forfeited their right

to bring a federal action by first pursuing the available administrative procedures, since such action would have resulted not in "the displacement of the section 1983 remedy, but [in] the deferral of federal court consideration pending exhaustion of the state administrative process." 454 U.S. at 136 (concurring opinion of Justices Brennan, Marshall, Stevens and O'Connor) (emphasis in original).

Although each of these decisions was concerned with the propriety of requiring exhaustion of state administrative remedies, the passages quoted above are not limited to the case of involuntary
73 exhaustion. It is the nature of such

⁷³ The Chief Justice in Moore described a number of advantages that might follow if a potential federal plaintiff were first to utilize available state administrative remedies, including application of any specialized experience the agency might have, compilation of a record which could

administrative proceedings which negates any binding effect.

Even if section 1983 does not prevent in all cases giving preclusive effect to state administrative determinations, it does not follow that the application of res judicata or collateral estoppel is appropriate in all or even most cases. The Court should determine whether this is the type of agency to which preclusion principles should apply. McDonald v. City of West Branch. See supra, pp. 57-76.

B. Application in Tennessee

The petitioners summarily state that "an adjudication by a state agency acting in a judicial capacity is entitled to preclusive effect in Tennessee Courts."

be used by the federal courts, and resolution of the controversy short of federal litigation. 431 U.S. at 524-25. Voluntary utilization of state administrative remedies is equally likely to entail such benefits.

Pet. Br. 20. This bare assertion does not describe the Tennessee law on preclusion nor conclusively show what preclusive effect, if any, Tennessee courts would accord the decision in this case. First, collateral estoppel will not be applied by Tennessee courts unless the issue determined in the first proceeding was necessary to the judgment. Scales v. Scales, 564 S.W.2d 667, 670 (1978); King v. Brooks, 562 S.W.2d 422, 424 (1978); Shelley v. Gibson, 400 S.W.2d 709, 714 (1966). In addition, the body making the first determination must have jurisdiction to decide the issue. The three cases cited by the petitioners illustrate this point. In Polsky v. Atkins, 197 Tenn. 201, 270 S.W.2d 497 (1954), the Commissioner of Finance and Taxation had specific statutory authority under Tenn. Code Supp. 6648.17 (1950) to decide the

issue -- the fitness to hold a liquor license. Similarly, in Purcell Enterprises, Inc. v. State, 631 S.W.2d 401 (Tenn. App. 1981), the issue in a contract action had been previously determined by the Board of Claims which had jurisdiction pursuant to Tenn. Code. Ann. § 9-80-207 et seq. See also Fourakre v. Perry, 667 S.W.2d 483, 488 (Tenn. App. 1983) ("The plaintiff submitted the issue of negligence ... to a tribunal having full authority to decide that issue").

While the Tennessee courts have not definitively answered the question of which bodies have jurisdiction to adjudicate employment discrimination issues, the decisions strongly suggest that such authority vests either in the Tennessee Human Rights Commission or not within the state system. DePriest v. Puett, 669 S.W.2d 669 (Tenn. App. 1984); Chamberlain

v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969). In DePriest a discharged employee raised the issue of religious discrimination in her appeal from a decision by the Civil Service Commission upholding her dismissal from state employment. Her appeal urged, inter alia, that the standards of "reasonable accommodation" under 42 U.S.C. §2000e et seq., applied to the statute governing the dismissal and/or demotion of an employee, Tenn. Code Ann. § 8-3227, as well as to the rules applicable to the Tennessee Human Rights Commission. She claimed that the statutes governing the Human Rights Commission and the Civil Service Commission should be read together or construed in pari materia so as to afford her the benefit of the more demanding standard under the Human Rights statute. The court rejected this claim:

The courts of this state have often said that statutes relating to the same subject matter should be construed together.... The two statutes here, however, do not relate to the same subject matter [O]ne deals with discrimination in the work place while the other is concerned with establishing and maintaining a merit system for state employees....

The intent [of the legislature] is clear enough from the plain reading of the statutes. The enforcement of claims pursuant to T.C.A. §4-21-101 et seq. must be brought before the Human Rights Commission.

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669 S.W.2d at 676. (Emphasis added).

While the Tennessee Supreme Court has indicated that the Human Rights Commission has general jurisdiction over employment discrimination claims within the state, it is doubtful whether this encompasses rights asserted under 42 U.S.C. Section

⁷⁴ The court saw nothing wrong in allowing the plaintiff to "separat[e] her avenues of relief" since the statutes concerned different subject matter. Id.

1983. In Chamberlain v. Brown, supra, the court held that Tennessee state courts did not have jurisdiction to hear such claims:

[A]fter considering the Congressional Records pertinent to this legislation ... we are firmly convinced that these statutes creating this action were directed to the federal trial forum, not the respective states. In any event no policy of this state can be found in its history, judicial or otherwise, that would require the judicial branch of the government of Tennessee to entertain such action. Id. at 250, 251, 223 Tenn. at 31.

223 Tenn. at 31, 442 S.W.2d at 250-51. Having been divested of jurisdiction by the state supreme court, it is unlikely that a lower state court would hold that an administrative agency had jurisdiction to consider such claims in the absence of

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positive state legislation⁷⁵ or that an individual would be precluded from raising the claims in a subsequent federal suit. See Whitfield v. City of Knoxville, 756 F.2d 455 (6th Cir. 1985) (Plaintiffs unable to raise ADEA claims in Tennessee state action not estopped from raising such claims in federal court). If, despite Tennessee's position with respect to section 1983 claims, the state courts would apply preclusion to an agency's decision, it would be inappropriate for the federal court to do so:

[T]he federal courts could step in where the state courts were unable or unwilling to protect federal rights. [Monroe v. Pape, 365 U.S.167, 176, 173-74]. This understanding of §1983 might well support an exception to res judicata and collateral estoppel

⁷⁵ Compare Parker v. Fort Sanders Regional Medical Center, 677 S.W.2d 455 (Tenn. App. 1983) (state court has jurisdiction for federal claims under ADEA, in part, because Tennessee had enacted an age discrimination statute in 1981).

where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim.

Allen v. McCurry, supra, 449 U.S. at 101.

See also McNeese v. Board of Education, 373 U.S. 668 (1963) (exhaustion of state administrative remedy not necessary under section 1983 where such remedy not adequate).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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A P P E N D I X

TRANSCRIPT EXCERPTS

MR. PARKER: Thank you sir. We would respectfully submit to the Hearing Examiner, that the statement of counter-issues are completely improper, and we would point out to the Hearing examiner that a civil proceeding, such as is presently underway, in the United States District Court, for the Western District of Tennessee, the Jackson Division, wherein the Employee, through his distinguished counsel has sued the University Agricultural Extension Service and many of the University's officials for the exact charges that have been raised in the counter-charges by counsel at this time; and that those issues are not before this proceeding, but are in fact before the Federal Court in another matter; and we will also point out that part of the reason why this proceeding has been delayed unto this day, is because of the Agricultural Extension Service was under a Federal Court Order, not to do anything regarding the employee and his employment relationship, but to leave that relationship intact as the University had done so, so, that the Employee's rights would in no way be prejudiced or in any way touched.

The University has no intention whatsoever of touching the employee's rights until, if at such time, there is proof adduced and proof sustained that there is grounds for his employment to be terminated with the University; and matters that are raised in the counter-issues by distinguished counsel are before another court, and not before this Hearing.

This Hearing is for one sole purpose, that was pointed out by the Vice-President from the University, when he instituted this proceeding, and that is to determine if there are grounds to terminate Mr. Elliott from his employment with the University of Tennessee Agricultural Extension Service and the University respectfully, completely and totally submits that Mr. Elliott's race is not an issue in this matter; and there has been no charge by the University that he is unable to do his job because of his race, nor would the University ever make such a charge, because such charge is abhorrent and is false and is not true, nor does the University even charge the employee with inability to do his job.

The University has only charged that for some reason did not do his job.

i, 33-35

* * *

HEARING EXAMINER: All right, gentlemen, and I am referring to counsel for the respondent and complainant, now, up to this point, we have had, I think, very wide discussion, and the Hearing Officer has tried to be as receptive and as lenient as possible, which I have the authority to do, I believe under the A. P. A.

i, p.36

* * *

MR. WILLIAMS: ... [W]e asked in Interrogatory number seven, to, in regard to the alleged charge that the Defendant violated work rule number twenty-four, to identify and describe the exact standard

used or applied in determining unacceptability to the University and the response, and they are bound by this, was as follows: "The Standard to use of unacceptability by the University is that behavior which is determined by the University supervisors of the Agricultural Extension Service to be unacceptable, and is a question of fact for the Hearing Examiner in this case."

Now, how can anyone have any advance notice of that? The University might determine that Mr. Elliott's conduct, of employing a rather controversial lawyer, by the name of Mr. Avon Williams as his counsel, was unacceptable as I am sure that it is unacceptable to the University, but it is not a ground for depriving him of his job there; and they could not do so.

In response to unacceptable, unacceptability to the community, they say see the answer to interrogatory number seven (b). So, they are saying that the University also determines what is acceptable or unacceptable to the community.

I respectfully submit, let's actually, when we get into this matter, in Federal Court, as we will ultimately, uh, what we are going to show is that we have got some Ku Klux Klan white, type white persons, up in Gibson County, and maybe a few in Madison County here too, who didn't want Mr. Elliott to play golf at the Country Club which was open for access to all white persons, virtually all, but not to blacks; and that as a result of efforts by the NAACP to secure admission of Blacks to the golf course of the Gibson Country

Club, that a gentlemen by the name of Jack Barnett, who used the word "nigger" and admitted he did it under oath --

HEARING EXAMINER: Excuse me, can I interject here?

MR. WILLIAMS: Well I am just, that is exactly why --

HEARING EXAMINER: I believe that you are expanding. You do as, you go right ahead, but I believe that you are elaborating on some things that are not relevant here.

i, p.76,77

Q. (By Mr. Williams) And uh, they had this work rule twenty-four at that time, didn't they, about the behavior unacceptable to the University and the community?

A. Yes.

Q. And so you made a determination for being fined for public drunkenness, was not behavior unacceptable to the flagship University of the Great State of Tennessee, is that right?

MR. PARKER: Your Honor, we would like, first of all to object to the -- the charges that have been made in this case arise out of Madison County under its present extension leader, and how charges have been handled in other counties, involving other employees, are other matters; that are not pertinent to this matter.

i, p.149

MR. PARKER: Mr. Hearing examiner, if this line of questioning [relating to the treatment of other employees] is allowed, we think that it would be first necessary for distinguished Mr. Williams to establish when this work rule was created and whether the incident that he is trying to ask the witness about, occurred after the work rule was in place; but we still would object because this employee was disciplined by his extension leader in Madison County, not by some other person, some other place.

ii, p.151

HEARING EXAMINER: Let me make a comment, if I may in response to, both the objection and your comment, Mr. Williams.

Again, I would relate to my charge here, and it relates specifically to trying to determine based on the evidence that is presented here, as to whether or not Mr. Elliott, the respondent here, actually did violate certain work rules.

This line of questioning to me gets, I think, away from this particular subject. You have another forum, I believe that you are already in court, to bring this, and therefore, I am going to sustain this objection as I don't believe that it is relevant to this particular factual issue.

MR. WILLIAMS: Then I take it, the Hearing Examiner is going to determine subjectively, in his own mind, and without regard to actual interpretations by the University, of this work rule --

HEARING EXAMINER: I am going to listen to it and I am going to allow broad evidence to be presented, even though it might be even sometimes a little bit broader than what, even counsel, would want to have admitted.

I am trying to allow sufficient information here, so that I can determine whether or not, or make recommendations as to whether or not this incident occurred. Now, I cannot in this particular forum determine whether or not there was discrimination or segregation. I don't see this as my charge. I will allow you to proceed with this line of questioning, but I cannot allow you to bring in other employees and other people who, I would certainly, sustain Mr. Parker's objection to that. Other people have rights that would be violated also here.

We want to be as lenient as we can, and will allow you to proceed, and would like for you to keep it if you can related to the issues.

i, p.152-153

* * *

MR. WILLIAMS: Well, I would respectfully submit, and I urge, as a matter of the record, that anything pertaining to Jack Barnett, and his motivation and the proof that there are here seeking to establish, the phone calls, which he alleges that the, Mr. Elliott made, and anything pertaining to their motivation is relevant in reference to any allegation by the University that it is involving itself in this affair by saying that that it is unacceptable behavior to the University.

That was the only part that I was trying to make, Mr. Hearing Examiner, and I will try to abide by the ruling.

HEARING EXAMINER: Proceed.

MR. WILLIAMS: Yes sir.

Q. Now, sir, as a native of Clarksville, Mississippi, would you not say that you are familiar with the phrase male black?

A. Yes sir, I am familiar with it.

Q. And would you not say that you have seen and known about segregated country clubs?

MR. PARKER: Again, Your Honor, I am going to object again. The witness' background, whether he is from Mississippi or from New York City is irrelevant to this hearing. I object to all of this line of questioning. I think that we have gone too far. This is not going to impeach this witness. He can ask him how he knew the knowledge that was here, about the M/B designation on this report; and what it meant, who made it, what he did with it, and all of that, or whether he refused to do anything with it, or whether he recommended prosecution, because of it; or whether he refused to recommend prosecution from it; and all of that. But, to go to where the man's background is completely irrelevant, and I strongly object; and I have a personal objection to it also.

Let the record reflect that I am from Mississippi, and I strongly object to any inference that somebody from Mississippi can't be objective.

HEARING EXAMINER: Sustained.

Q. All right, I will now hand you Exhibit Fourteen and will ask you to read that last line on the last page, on the third page, Exhibit Fourteen?

A. "8-30-79, info referred to Humboldt Police, Lt. Espy, 855-1121 for prosecution. Subject is male black trying to join the country club."

iii, p.421-423

MR. PARKER: Let me just say that he is not understanding my objection. I think that certainly he can ask the witness about his bias, however, I think that it is wrong to ask Senator, this witness about the bias of the University. I think that he should ask this witness about his bias, not the University's bias. That is what I am talking about. That is the reason that the case against the University that is in Federal Court, should not be tried through this witness here. This witness could testify as to his bias, and that is my objection.

iv, p.486

* * *

MR. PARKER: Just a minute, Your Honor. I would like to interpose, if there is some purpose relating to this hearing by bringing the evaluations in for other employees, I think it ought to be shown what that purpose is. Other

employees are not on trial here. I don't think it is proper that their evaluations be paraded before this public hearing unless there is a purpose to be shown. The issue here is not whether other employee did their work, but whether Mr. Elliott did his work and I am not going to let the hearing become a trial of other employees.

ix, p.111

MR. WILLIAMS: Mr. Hearing Examiner, I don't understand this matter, in order to protect other employees. Public employees have no rights of protection of rating and evaluations that are given them. We certainly have a right to have them received as evidence and cross examine this gentleman on them. These are not formal ratings. There are in effect recommendations he said that he made to the district supervisor. They are his recommendations with regard to these employees and if those recommendations tend to show a racial pattern, we are entitled to show that.

They do show a racial pattern.

MR. PARKER: They do not. Mr. Butler has been rated low right here too. Mr. Elliott is getting all the due process that the law gives him, and it is wrong to prejudice their rights without due process to them, as their ratings may go up and down. This is the other male agent, and his ratings have been low too.

HEARING EXAMINER: They may be similar almost, but I wouldn't call them patterns.

ix, p.124,125

MR. WILLIAMS: Well, didn't they raise the specific question that anybody knew Mrs. Pipkin, a sweet little old elderly white lady was totally incompetent, she was the talk of the town and yet you did nothing about it?

MR. PARKER: I am going to object again, because the --

HEARING EXAMINER: Sustained.

MR. WILLIAMS: Well, why, Mr. Hearing Examiner. I respectfully submit that if, that anything that related to an issue involving Mr. Elliott, this was raised at the Ag Committee meeting in reference to his, the effort to attempt to discharge Mr. Elliott. Now just because Mrs. Pipkin is white, she is not sacrosanct if Your Honor please and this gentleman is entitled to have uh, this uh, Honorable Court to know what actually went on.

ix, p.132

MR. PARKER: Your Honor, first of all, I strongly object to the, my distinguished counsels statement that I am trying to destroy his client or that he Dean of Agriculture Extension Service is trying to destroy his client. The purpose of this hearing is simply to find out if there are facts that would support a recommendation to terminate by this Hearing examiner or that would not. That is all it is for. The University does not want to destroy Mr. Elliott, but the lives of other people and their ratings do not, do not show whether or not Mr. Elliott did or did not do his job. They are a completely separate issue and there is absolutely no reason for this hearing to

look into the background of a woman who is dead, who, there is no way to take any punitive action against her if she, if such should be taken, it serves no purpose at all, and it shouldn't be looked into. We object to it. Again, there is a pattern here of trying to try this case by trying other people and that is wrong. This is a case to try to find out whether or not there are grounds either not or to recommend termination of Mr. Elliott.

HEARING EXAMINER: Would you read the question again so that I can determine whether or not I want to make a retraction or sustain the objection.

COURT REPORTER: Everybody knew that Mrs. Pipkin, is that the right name? Was totally incompetent and the talk of the town and yet you did nothing about it?

HEARING EXAMINER: Objection sustained.

Q. (By Mr. Williams) Were you asked by members of the County Agriculture Committee to investigate the question of the competency of Mrs. Pipkin to do her job?

A. I was talked to by members of the Agriculture Committee about Mrs. Pipkin.

Q. All right, which members talked to you?

A. Mr. Donnell and Mr. uh, Arthur Johnson.

Q. Did Mr. Boone talk to you?

A. No sir.

Q. Mr. Wallace Ivy?

A. Mr. Ivy did not. Mr. Boone may have mentioned it to me. Mr. Boone brought it up in a committee meeting.

Q. What did Mr. Boone say about it in the Committee meeting?

A. Just asked a question about it?

Q. What question?

A. I do not recall.

Q. Well, what were you asked by Mr. Bonnell and Mr. Johnson about it? What did they say?

A. Senator, I believe the uh, things that have past and the things that are concerning Mrs. Pipkin --

Q. What did they say about it please sir?

A. They asked me about the fact of Mrs. Pipkin's competence and whether or not she was doing an outstanding job.

Q. They questioned some of the things that they had heard concerning Mrs. Pipkin and I looked into it, I dealt with them, I --

Q. Did they tell you that people were talking about her? Excuse me, I shouldn't have said that, go on.

MR. PARKER: Well, going back again, just what we objected to, Again, I am trying to be just a cooperative as I can

be, but, it has already been ruled not to go back into Mrs. Pipkin in a personal way and I object to it.

MR. WILLIAMS: If the Court please, I am asking about official proceedings of the very committee which is uh, which uh dealth with Mr. Elliott and he said that, uh that uh they asked him uh, uh, uh about her competency and now my next question is going to be what did he do about that.

MR. PARKER: Your Honor, if I could make one statement. This hearing is not a catharsis to lay out the dirty laundry of the Agricultural Extension Service. This hearing is, this hearing regards Mr Robert Elliott. If there are other matters of which people may have information, they should bring it to the university and let the university investigate it. This not a grand jury, this is not the place to accuse other people who have privacy rights that they may have done something wrong or did do something wrong. Those people have rights and we have responsibilities as university officials to see that those rights are protected. If people have information about other people doing something wrong, they can bring it to the Dean of the Agricultural Extension Service and he will investigate it. And it is wrong to do it this way. it is very wrong.

MR. WILLIAMS: I will respectfully submit --

HEARING EXAMINER: If you please, let me speak then and you may speak. This has come up, I say at least, well it came up when we were here before and it has come up several times today. I have tried to relate what I think my job is, what I see

be, but, it has already been ruled not to go back into Mrs. Pipkin in a personal way and I object to it.

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MR. WILLIAMS: I will respectfully submit --

HEARING EXAMINER: If you please, let me speak then and you may speak. This has come up, I say at least, well it came up when we were here before and it has come up several times today. I have tried to relate what I think my job is, what I see

my job to be, and I have been as lenient and I use the word lenient I guess a dozen times here, uh, I don't see any point in continuing to bring these things up, and I think Mr. Parker is absolutely correct in the lives of other people. They are not on trial here. I see what your line of questioning relates to, whether or not I think I know what it relates to, uh, I cannot permit you to continue to bring in uh competence or incompetence or whether it is racial slurs or whatever it might be relative to other people. I don't. I, let's try to get, the fact remains that as Hearing Officer, sooner or later I am going to have to try to determine whether or not these charges are true, and I will do my best to use what discretion that I have relative to this whole line of questioning. Now you can take that for whatever it is worth Mr. Williams. I will do the best I can, but I am going to have to sustain this objection and I believe I am totally right in doing it and I believe if I am unfair --

MR. WILLIAMS: It doesn't do any good to permit me to be heard if you sustain the objection before I speak.

HEARING EXAMINER: I am talking about the objection that I just sustained relative to this lady. I understand your implication there also, but you are incorrect. I will advise you of that.

ix, p.134-138

* * *

Q. (By Mr. Williams) Why are Miss Judy Cloud's records not in the file over there?

A. Miss Judy Cloud's records were in the file, the ones that I had asked for. They are only required to be kept for a period of three years. One year is in the one file and then the past two years are in our files.

Q. Now they had records in the file all the way back to 1971 prior to this proceeding against Mr. Elliott, didn't they?

A. Some agents have them that far back, and some throw them away when the three-year period is past.

* * *

xi, p.29

MR. WILLIAMS: I am requesting, Mr. Hearing Examiner, that those records which this witness says he examined of all the other employees for that year and that he says were in good form be furnished and made an exhibit in this case.

MR. PARKER: Object as being irrelevant and immaterial to the charges against Mr. Elliott.

HEARING EXAMINER: I believe we have been over this before. Sustained.

* * *

xi, p.33,34

MR. WILLIAMS: Well, turn to the next page, sir, and look down at August 11th where it is encircled there, it says at 9:45 one of your personnel left for the grocery store and lunch and arrived back at 1:00 p.m., and is signed, "Judy." That is Judy Cloud again, isn't it?

A. That's right.

Q. Do you know what she did at the grocery store?

A. No, sir.

Q. Do you know which grocery store?

A. No, sir, I do not.

Q. How would anyone looking at this record have been able to determine where she was?

MR. PARKER: Object to that question. Miss Cloud is not on trial. She is a home demonstration agent. She makes demonstrations. She has to go to the grocery store. Without her being here to explain, it is improper to have someone else explain what she thought. I object to it.

MR. WILLIAMS: The witness has said --

HEARING EXAMINER: The objection is sustained.

xii, p.156,157

HEARING EXAMINER: Read that, if you would. Specifically which one are we referring to?

A. (By the Witness) Rule 22, "Using University telephones for personal calls without permission except in an emergency or charging personal calls to the University."

Q. (By Mr. Williams) This is prohibited under that work rule, isn't it?

A. What's what it says.

Q. Why haven't you enforced that as to local personal calls in your office?

A. I don't know how much difference it makes, but the telephones in my office are not University telephones. They are Madison County phones. This would certainly not be something that I would ask each employee, including Mr. Elliott, to come to me and ask me each time he wanted to make a phone call. I have not had any problem with this being a persistent problem, and I have not felt I need to deal with it.

. . .

Q. As a matter of fact, you know that Miss Judy Cloud would sit for hours and talk to her boyfriend on the phone over there?

MR. PARKER: Object, Your Honor.

HEARING EXAMINER Sustained.

Q. (By Mr. Williams) But you never investigated the extent to which any of your white employees were talking on the phone to their families or their boyfriends on any kind of personal business here in the City of Jackson, did you?

MR. PARKER: Object, Your Honor.

HEARING EXAMINER: Objection sustained.

xiii, p.12-14

* * *

Q. (By Mr. Williams) And I take it at this time that you all volunteered to help Mr. Shearon, was in December of 1981, that was when Miss Pipkins passed away?

A. Yes.

Q. And you were aware about the scandal about her performance too, weren't you?

MR. PARKER: Your Honor, I object to this questioning about Miss Pipkin.

MR. WILLIAMS: I would respectfully call to the attention of the Hearing Examiner, that we filed a counter statement of counter issues in this case, and the issues of racial discrimination is an issue in this case and they are in Exhibits two and three. I would respectfully request that the Hearing examiner reconsider inasmuch as we have raised very grave constitutional questions in those statements and counter issues and as the Hearing Examiner for the University of Tennessee, it is a denial of the university under those constitutional statutory constitutional provisions for the Hearing Examiner to absolutely refuse to hear testimony regarding, with regard to uh the treatment of the university officials for other persons who were white in respect to matters of which there were complaints. They have a right to --

HEARING EXAMINER: I believe we have heard a substantial amount of testimony as it relates to this particular objection. It is sustained.

xvi, p.32

* * *

(HEARING EXAMINER): I think that we spent quite a bit of time discussing the counter-issues on the first morning, the first day of the hearing; and, perhaps we dispense with those to your satisfaction, but I have, I believe I have since allowed a great deal of testimony relating to the racial issues, perhaps trying to get to the underlying motives behind it and so forth. I have also indicated that there are certain factual issues relating to his job performance, the question of whether or not there were violation of University work rules, and these are something I have to deal with, and I am going to try to take everything into consideration in this hearing, that is within my prerogative, as Hearing Officer, within the confines of this Administrative Procedures Act.

Now, as it relates to this particular document, I am of the opinion that if the audit were complete, and had been finally, if this was a final document, I am of the opinion that it would not be admissible, if it were, but as it is, as an incomplete document, I certainly feel that until and there may be some questions that have been already brought in here, that are incomplete that ought to be considered just as well, Mr. Williams, and I will assure you that this Hearing Officer will do these things.

So, but I am going to sustain this objection.

* * *

xix, p.128

MR. PARKER: I would like to state a continuing objection for the record. The University is being placed in a position to where it is going to have to try a

Title VII discrimination lawsuit here at this forum, and there is no jurisdiction in this forum for such a case. The charges have been stated, for this hearing, and it is -- I continue, I will continue to object to all efforts to try to force the University to try a Federal lawsuit here, in this hearing.

I know that Senator Williams is not going to be willing to bind himself to whatever proof that he puts in relative to pretext here, in his Federal lawsuit; and if he is willing to bind himself, so that no further proof would be placed in that case, then I would be willing to discuss that. But, I know that he is not going to do that, and it is improper to make the University try that case twice, and it should not be placed in that position, and that is my continuing objection.

* * *

xix p.129

Q. (By Mr. Williams): Mr., Dr. Downen, did you know that when an Extension Agent went and applied for Extension Leader in one of the West Tennessee counties, he was not even interviewed? Black Extension Agent?

MR. PARKER: Your Honor, again, what another person has in another county, did regarding their interview, I object. It has no relevance here.

HEARING EXAMINER: Alright, your objection is sustained.

Q. (By Mr. Williams): Alright, sir, I will ask you once more. Did you know that the Extension Agent, a white Extension

sion Agent in Shelby was made acting Extension Leader over Mr. Braswell in 1982, with less time in service?

MR. PARKER: I object.

Q. Over the --

HEARING EXAMINER: Sustained.

Q. Over the black Agent rather, not over Mr. Braswell?

MR. PARKER: I object to the relevance of the question.

HEARING EXAMINER: I have ruled. Proceed.

xix p.144-45

Q. (By Mr. Williams) Alright, well, in any event, there were not any substantial number of white agents who were reassigned following school desegregation were there?

MR. PARKER: Your Honor, again, I am not going to sit here. I, at some point, I can't sit here, because this is not a class action suit, and this question doesn't relate to whether or not there has been any racial discrimination against Mr. Elliott as a person by the supervisor, that is supervising him now or the District Supervisor that is supervising him now or his Dean, and this question doesn't have anything to do with the charges in this case.

It may have something to do with the Senator's lawsuit, which he has brought, his class action against the Extension Service, but I have made continuing objections to this hearing being a place

for discovery in that lawsuit, and I am just marking my continuing objection. This question and all of the questions like it, don't have any thing to do with the charges in this case. It is improper for us to spend days going through all of this. We will never finish it.

MR. WILLIAMS: It has to do with the statement, Mr. Hearing examiner, it has to do with the statement in this Exhibit Forty-three, which my distinguished adversary has introduced.

MR. PARKER: It does not.

HEARING EXAMINER: Gentlemen, I am going to sustain this objection, and I believe this is the same thing as, the same context again and I would like for us to move on and we seem to be doing pretty good here relative to issues and let's try to move in that light if we can.

xxiii, p.30

* * *

HEARING EXAMINER: Let me ask you a question, Mr. Williams, and maybe you can help my memory, but have you not asked that question very specifically, that almost identical question before? If I haven't heard that question before, then I guess that, many times really, honestly I believe I can, there's nobody else going to read this transcript and make a recommendation but me. I am at a loss to know really what else I can draw from this as a Hearing Officer. Therefore, I am going to sustain this objection.

xxiii, p.131

MR. PARKER: Your Honor, I am trying to let things proceed, but Mr. Colley [sic], whether he should be a judge is not on trial here. This, this letter speaks for itself as to what it say, but going into whether he should or should not be a judge, that is not the issue in regard to Mr. Elliot. Now I think it is wrong here in this public forum to be trying Mr. Colley [sic] as well as all these others in Madison County, whatever their records, whatever their background. They are just private citizens.

xxiii, p.129

MR. PARKER: I strongly object to that, Your Honor. That doesn't relate to this hearing. If he's got some allegation to make against Mr Shearon -- I'm tired of Mr. Shearon, Mr. Coley, Mr. Sanford Smith, all of these people who are citizens of this county being paraded through this hearing as though there is something wrong with them. If there are charges to be brought against them, there's the Attorney General of this county and there's the Agricultural Extension Dean who can be contacted apart from this hearing. I'm tired of these people's reputations being paraded through this hearing and I don't think that we should go any further with it. I object and I ask for a ruling on it.

MR. WILLIAMS: Mr. Hearing examiner, I'm not concerned about what distinguished adversary counsel is tired of and there's been just too much of what he's tired of and what he thinks is right. He should state an objection and state a reasonable ground of objection and he has stated none. The question in this case was designed to elicit whether or not the Dean

is aware of and has apprehended and/or has investigated racial attitudes on the part of Mr. Curtis Shearon as an individual who in reference to his charges of inadequate job performance and other alleged misconduct -- job misbehavior on the part of Mr. Elliott. Dr. Downen has said that he credits his testimony absolutely and has made a finding that he harbors no racial discrimination or racial attitudes toward Mr. Elliott and that the conflicting testimony given between him and Mr Elliott -- as to that testimony the Dean has selected Mr. Shearon's testimony to believe and not Mr. Elliott's despite racial circumstances. Now, I'm entitled on that score to ask him the question about whether he is aware of racial attitudes being expressed and expressed at the same time that he was making these determinations by Mr. Shearon in his office towards others. That's point one and the second point is, as to the white secretary and her refusal to perform work for Mr. Elliott, I'm certainly entitled to ask him about that because that is racial discrimination against Mr. Elliott himself going on in an office where he says that Mr. Elliott is still an employee and is being attacked only and solely on account of his professional performance and onto on account of his race.

HEARING EXAMINER: Hold on a moment, Mr Parker. I said I wouldn't repeat this any more and I think I've said this a couple of times during the hearing, but I do not have the authority, as I perceive it, to try or to make rulings relating to racial discrimination in this administrative hearing.

. . .

HEARING EXAMINER: Let's continue, gentlemen. I've sustained your objection and already made comments about the other forum for hearing this particular evidence related to the racial issue. Let's proceed.

xxiv, p.175-178

* * *

HEARING EXAMINER: Objection sustained.

Q. (By Mr. Williams) What, if anything, did you observe with regard to gifts by Mr. Shearon to office personnel?

MR. PARKER: I object to that question. It's irrelevant to the --

MR. WILLIAMS: It's relevant on the issue of the attitude, the racial attitudes, of Mr. Shearon as bearing on the treatment of Mr. Elliott in this case.

MR. PARKER: It is not. It may relate to some claim of race discrimination that is a Title VII case pending in Federal Court, or the claim of race discrimination in the Equal Employment Opportunity Commission office in Memphis. It doesn't relate to these proceedings, and I'm going to object to it now and in the future.

HEARING EXAMINER: Objection sustained.

xxvii, p.15

* * *

MR. PARKER: What is said in this hearing about people who are before the hearing is proper, but it's not -- this hearing is not going into matters that is not before the hearing, and the officers of the court are not supposed to go into matters that are not before the hearing. We are supposed to stay on the matters; that's all we're supposed to do. We are here to find if the charge is to be sustained or not. This is not a Title VII race discrimination case. The kind of testimony [the treatment of other employees] that is asked to be elicited from this witness relates to that and would relate in that case and jurisdiction of that case in the United States District Court, the Western District of Tennessee, and we have filed responses in that case, and this hearing has no jurisdiction over those matters. This hearing is to determine whether or not the charges should be sustained or not. That's the reason that these matters are irrelevant. They should not be tried here. And also there is an EEOC complaint, and the EEOC will investigate this. For it to be brought out here and now is wrong. It's wrong because it's irrelevant and it's immaterial. This administrative proceedings doesn't have jurisdiction over those matters, and if I'm going to have to stand here and fight from now on about what the issues are, then maybe we are going to have to stop and get clarification from the Vice President as to what the issues are because -- unless we have your ruling

as to what the issues are -- because I am not here and I am not prepared, and I -- and it will take me some time to prepare cases that are going to be brought against all the agents in this county or in other counties or against the whole University or in a class action against the University. I did not now that this was the case I was coming to try. If it is, I demand that there be a recess for such time that I can have time to prepare for that.

MR. WILLIAMS: May I be heard just briefly further?

HEARING EXAMINER: Make it as brief as you can.

MR. WILLIAMS: He keeps bringing up the Federal Court case. The federal Court case has nothing to do with it. We will undoubtedly be met at the threshold of that case by an argument which you will then make in Federal Court that they exhausted their administrative remedies down there, and that will determine the -- if this should be determined adversely to us. It's already been adjudicated by administrative quasi-judicial officer that Mr. Elliott was guilty of these violations, and therefore, there is nothing that needs to be decided in the Federal Court. Counsel has not addressed to the points I made earlier. The last statement that he made about coming here to try cases against other employees is not relevant because we are not trying cases against other employees. We are showing standards of conduct and standards of treatment that this young lady observed on the part of the agent of the University of Tennessee operating its Madison County office down here, and we are entitled to

show that that -- if that conduct involved anybody, it if involved the mayor of Jackson. We feel entitled to show it in this proceeding.

HEARING EXAMINER: Okay, gentlemen. I believe both of you have had your arguments sufficiently. I've allowed your arguments on both sides for one purpose specifically, and that is so that this can be in the record for counsel for both sides. I distinctly remember that this very issue was brought up in cross-examination of one or more other witnesses. There was an objection, and I believe there was a ruling by this Hearing officer, and I believe, if I remember correctly, it related specifically to this very incident in question.

Now, this is in the record, both arguments are in the record, and now the ruling again will be sustained. You may proceed. If I am wrong, then there will be a later review I'm sure, and that will be determined at that time whether or not I am right or wrong. For the time now, my ruling is again I will sustain this. Proceed. Now you will not allow any further lengthy -- you will have an opportunity to argue, but we are going to keep it more brief than that in the past. Let's proceed.

* * * xxvii, p.25-30

Q. (By Mr. Williams) Have you observed any evidence of racial discrimination in the office?

MR. PARKER: I object to that.

HEARING EXAMINER: Sustained.

Proceed with the questions relating to job performance and job behavior.

Objection sustained.

xxviii, p.210

* * *

MR. PARKER: Mr Hearing examiner, there, I don't want to believe, really that there are certain things, there is a lawsuit of a class action brought in the United States District Court for the Western District of Tennessee, Jackson Division, in which that class action allegation that the 4-H program for Mercer, Tennessee has been handled on racial lines. This is not the place for testimony to be brought in concerning that. Mr. Elliott's job assignment for the period in which he, for which he is, the charges have been made against him, have nothing to do with any primary assignment in 4-H or that he's been assigned to either small farms agents for the University of Tennessee. There's already been all kind of testimony about how, he came to become small farm agent, which occurred long before Mr. Shearon ever came to this county and those matters don't relate to the issues here. They may relate to that lawsuit that's pending in United States District Court, but again, I, I'm not prepared here to fight that class action. There's been no justification yet that that class action can ever be maintained and to start here having proof under oath here, where, where we have to counter that proof. Again, I, I submit is improper. It is, it is expanding the scope of this proceeding and

that's the reason I continue, I have a continuing objection to this line of question.

xxix, p.27

* * *

HEARING EXAMINER: I am not getting any further into the issue which I know is going to come before a Federal Judge, who is competent and has the authority to listen to this, and I am sure, if I were in the same position, that I would want to proceed in this manner, if I felt that way, that your client feels, but I am not in a position to hear this any further, Mr. Williams. Please respect my position as Hearing examiner under the Administrative Procedure Act, and let's proceed with this hearing.

xxix, p.109

* * *

Q. (By Mr. Williams) Mr. Winston, I believe when we recessed you were talking about the disparities in salaries between white and black agents.

A. Well, there was an audit in the late 70's about this and I saw a report about this and the black agents --

MR. PARKER: Your Honor, before he goes further I'm going to object to his continuing to testify about this matter at this hearing. If he has a complaint, the place that he can file it is with the University or the proper authorities, and then they can look at it there. This is not the place to look at it and I object to going into this.

HEARING EXAMINER: This objection is sustained. That is not, in my opinion, the proper forum for this to be asked. Proceed with your next question, Mr. Williams.

xxxiii, p.3

* * *

Q. Did you have difficulty in winning any prizes for an integrated affair?

MR. PARKER: Your Honor, I object to that. Those issues - we recognize that this young man was outstanding in his 4-H activities and I object going into the background. This isn't the place. We have a lawsuit in which those issues are present.

HEARING EXAMINER: That is sustained. Proceed.

xxxiiii, p.133

* * *

Q. Can you identify Exhibits seventy-two and seventy-three?

A. Yes sir.

Q. Identify them please?

A. There are sign-out sheets that I had xeroxed to show that, well, it was said that I had signed out, rather loosely, and I wanted to show that this was the normal trend of signing out. Going to the grocery store or wherever and I wanted to show that everybody else, why

reprimand me for it when this was the common trend. And, after I found out that these, it was a secret about these that I could not get them, I started making my own copies early in the year.

Q. All right, sir.

A. One other thing I'd like to say about it, if I might, about that rating form. I noticed on the rating form, Miss Mary Blakemore, after this, this deal started here, after this hearing started, Miss Mary Blakemore has been receiving excellent ratings --

MR. PARKER: Your Honor, I object before --

A. But she has gone down to a four also.

MR. PARKER: I object and ask that that be stricken. Her ratings --

HEARING EXAMINER: Objection sustained. It's irrelevant.

MR. WILLIAMS: Well, I, --

MR. PARKER: You can go into that in the Federal Court case if it's a part of the pattern of practice, but it doesn't relate here.

MR. WILLIAMS: I would respectfully submit, Mr. Hearing Officer, that it is, it is incorrect to state that there is no issue of racial discrimination involved in this matter. Not only have we submitted an issue in that regard, but the issue is implicit in everything that has happened

in this case and, a pattern of racial discrimination because, against another black employee is certainly relevant.

HEARING EXAMINER: The objection is sustained. This can remain in the record for record purposes.

MR. WILLIAMS: All right.

Q. You have also, pick up Exhibit seventy-four. I believe you've also testified with regard to that one, the Ku Klux Klan document? Do you have anything to add in regard to that one?

A. No sir.

Q. All right, now, Mr. Elliott, pick up Exhibit seventy-five, please and, state whether or not you can identify that?

A. Yes sir, I can.

Q. What is it?

A. This is a complaint by me, that I put in the, the Civil Rights file and sent a copy to Dr. Ferrell. This was written on January 23, 1981 --

Q. Now, was it actually '81?

A. 1982, no it was '80 --

Q. It say it was --

A. This was written in '81, but it was about the year of 1980.

Q. Well, read it Mr., look at the second paragraph Mr., where was the mistake made, the second paragraph or at

the top of it? You couldn't write something in January of 1981 that related to events occurring in October 1981 --

HEARING EXAMINER: Objection sustained.

xliv, p.35-38

* * *

HEARING EXAMINER: Very well. Proceed.

Q. (By Mr. Williams) All right now, Mr., Mr. Elliott, what about the, the agriculture, Madison County Agriculture Committees across the state. What is their racial composition?

MR. PARKER: What, what, I, I --

A. Madison County is --

MR. PARKER: Wait a minute --

HEARING EXAMINER: Mr. Elliott, what's, let's clarify that question?

MR. WILLIAMS: What is the racial composition of the Agricultural, Madison, of the, UT Extension Service Agricultural Committee across the state?

MR. PARKER: Your Honor, I object to that question. It doesn't have anything to do with this, with, with, this hearing, plus they are not UT Agricultural Committees across the state. They are county agricultural committees and that doesn't have anything to do with the University of Tennessee as far as appointing those committees. Those committees are appointed by county governments. Just as the one here is.

MR. WILLIAMS: They are utilized --

MR. PARKER: I object. It's irrelevant, it's incompetent, it's immaterial to, to these charges.

MR. WILLIAMS: They're organized and utilized by the University of Tennessee Agricultural Extension Service.

MR. PARKER: Your Honor, they're organized and utilized pursuant to legislation passed by the General Assembly --

HEARING EXAMINER: Well --

MR. PARKER: Of the State of Tennessee.

HEARING EXAMINER: Gentlemen, these committees, you could have a different, situation in East Tennessee, Middle Tennessee, West Tennessee. I don't see what relevance the composition of an agriculture committee, for example, in a county in, Shelby County or Sullivan County, or wherever, would really have on this. I'm going to sustain that objection, Mr. Williams.

MAR 28 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,
v. *Petitioners,*

ROBERT B. ELLIOTT,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 85-588

THE UNIVERSITY OF TENNESSEE, *et al.*,
v. *Petitioners,*

ROBERT B. ELLIOTT,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT THE PARTICULAR AGENCY ADJUDICATION IN THIS CASE SHOULD BE DENIED FULL FAITH AND CREDIT IS NOT RESPONSIVE TO THE ISSUES BEFORE THIS COURT.

The question upon which this Court granted review is simply this: whether traditional principles of preclusion apply in actions under the Reconstruction statutes and Title VII to issues fully and fairly litigated before a state agency acting in a judicial capacity. Instead of addressing this question, the principal portion of respondent's brief is devoted to the argument that full faith and credit should not extend to the particular agency adjudication in this case because respondent was denied a full and fair

opportunity to litigate all of his allegations of race discrimination and therefore all of his claims under the Reconstruction statutes and Title VII were not decided by the agency. That question, which respondent did not raise at any time in the proceedings below, relates exclusively to the scope of preclusion to which the agency adjudication in this case is entitled under Tennessee law.

The Sixth Circuit did not review the proceedings before the state agency; nor did it give any consideration to the preclusive effect to which the agency adjudication is entitled under Tennessee law. Rather, wholly without regard to the scope and fairness of the agency adjudication in this particular case, the Sixth Circuit held that, in the absence of state court review, no adjudication of issues by a state agency is *ever* entitled to full faith and credit in a subsequent employment discrimination action.¹ That holding alone is the subject of review in this Court. Only after the question presented in this Court is resolved in favor of full faith and credit is there any need to resolve the further question of the extent to which the agency adjudication is entitled to preclusive effect in Tennessee courts. As this Court has recognized in *Marrese v. American Academy of Orthopaedic Surgeons*, — U.S. —, 105 S. Ct. 1327 (1985), and *Parsons Steel, Inc. v. First Alabama Bank*, — U.S. —, 106 S. Ct. 768 (1986), the issue raised by respondent—namely, the preclusive effect to which the agency adjudication is entitled under Tennessee law—is best left to the district court for its determination.²

¹ Under the Sixth Circuit's holding, the agency adjudication would be entitled to no preclusive effect even if respondent had been completely successful in his efforts to admit evidence of race discrimination unrelated to his proposed termination and in his efforts to have the agency try his claims under the Reconstruction statutes and Title VII.

² Respondent supports his argument that the particular agency adjudication in this case should be denied full faith and credit by

Despite the contrary impression respondent now seeks to create, the issue of alleged racial motivation for respondent's proposed termination was fully and fairly litigated *and* decided in the agency adjudication.³ Respond-

relying heavily on selective excerpts from the 5000-page transcript of the agency proceedings. The transcript was never entered into the record in the district court or the Sixth Circuit, however, and it is not properly before this Court. Respondent's *ex parte* augmentation of the record raises serious questions of procedural fairness of which respondent is otherwise so solicitous.

Respondent also supports his argument with allegations of inherent bias in the contested case provisions of the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 through -323 (1985), and bias on the part of the Administrative Law Judge. The agency proceedings were conducted, however, precisely in accordance with the governing statutory provisions which respondent freely and purposefully invoked. At no point in the proceedings themselves, in the district court, or in the Sixth Circuit did respondent ever allege that the proceedings were conducted in violation of the statutory provisions. Nor did he ever challenge the objectivity of the Administrative Law Judge. Respondent's request, prior to the appointment of the Administrative Law Judge, for appointment of an individual with no relationship to the University certainly cannot be construed as a challenge to the objectivity of the individual who later was appointed. If the Administrative Law Judge had evidenced bias during the course of the agency proceedings, respondent could have petitioned for his disqualification pursuant to Tenn. Code Ann. § 4-5-302 (1985). Failing that, he could have raised any due process concern either in a petition for review in state chancery court or in his post-hearing motions in district court. Respondent did neither.

³ Under well-accepted principles of issue preclusion—which is what petitioners seek in this case—an issue is conclusive in a subsequent action between the parties, whether on the same or a different claim, if the issue was litigated and determined and if the determination was essential to the prior judgment. *See generally* Restatement (Second) of Judgments § 27 (1982). Despite respondent's accusation to the contrary, petitioners' brief plainly argues that issues of individual discrimination raised by respondent's federal complaint were fully and fairly litigated *and* decided by the state agency. The requirement of a "full and fair opportunity to litigate" finds its source in numerous decisions of this Court and

ent concedes that the Administrative Law Judge only refused to decide discrimination issues "related to the proposed termination of Elliott." (P.A. 171) Respondent likewise concedes that the Administrative Law Judge did decide the question of whether "employer's action in bringing charges against employee . . . [was] based on . . . racial discrimination." (P.A. 177)

In the district court, respondent openly admitted that he had litigated the issue of alleged discriminatory intent as an affirmative defense and that the Administrative Law Judge had decided the issue against him. (J.A. 27) Indeed, there is an abiding irony in respondent's elaborate argument that he was denied a full and fair opportunity to litigate race discrimination issues in the agency proceeding. For upon his return to federal court, respondent did not contend that he was unable to introduce proof of discrimination. Rather, respondent argued that his proof of race discrimination was so overwhelming that the contrary finding by the Administrative Law Judge was unsupported by substantial evidence. (J.A. 28, 30; Dist. Ct. Nr. 27, filed Oct. 24, 1983, at 1, 3, 8-9) Respondent did not seek de novo review of the issue of race discrimination in the district court; he simply sought review of the merits of the agency judgment on the basis of the record of the agency proceedings. (J.A. 24-30)

Respondent never challenged the adequacy or fairness of the procedures under which his due process hearing was conducted at any point in the proceedings below. In fact, the district court specifically found that respondent had received full procedural protection in the agency adjudication:

Plaintiff makes no claim of denial of procedural due process. Nor can he in light of the long exhaus-

cannot fairly be characterized—as it has been by respondent—as a "carefully chosen phrase" designed to create a false impression in this Court. (Resp. Br. at 41)

tive evidentiary hearing in which plaintiff presented more than ninety witnesses, and cross-examined some of the agency's witnesses for more than thirty hours each. Plaintiff clearly has received full protection in this due process hearing, as required in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972).

(P.A. 31) As this Court explained in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), the concept of a full and fair opportunity to litigate acts simply, but importantly, as a federal restraint to ensure that a party against whom preclusion is asserted was afforded the minimum procedural requirements of due process. That the agency adjudication in this case satisfied the minimum requirements of procedural due process cannot seriously be disputed.

In their initial brief before this Court, petitioners acknowledged that the University successfully objected to respondent's attempt to file countercharges of race discrimination on the first day of the agency proceedings on the ground that the proceedings were not established for the purpose of prosecuting civil rights claims. (P.A. 44-45) Petitioners also acknowledge that the University successfully objected to some, but not all, of respondent's efforts to admit evidence of classwide discrimination and other allegations of discrimination unrelated to his proposed termination. Respondent's argument that the exclusion of evidence unrelated to his proposed termination somehow means, however, that the agency adjudication is entitled to *no* preclusive effect demonstrates his persistent confusion of issue preclusion with claim preclusion. Petitioners have never argued that claim preclusion applies to the agency adjudication. Rather, petitioners have plainly stated that they seek preclusion only of those issues actually adjudicated in the state agency proceedings, including respondent's affirmative defense that his proposed termination was racially motivated.

Respondent's repeated references to the agency's lack of jurisdiction to determine his civil rights claims under the Reconstruction statutes and Title VII is a curious reversal of his repeated attempts to try those claims before the agency. In any event, the agency's lack of jurisdiction over respondent's civil rights claims does not defeat the preclusive effect of the agency's adjudication of the issue of whether respondent's proposed termination was racially motivated—an issue undeniably within the scope of the agency's authority. See Tenn. Code Ann. § 4-5-322(h) (1) (1985). As this Court specifically held in *Marrese v. American Academy of Orthopaedic Surgeons*, — U.S. —, 105 S. Ct. 1327 (1985), a case which respondent does not even cite, a prior state adjudication of an issue is entitled to full faith and credit even if it involves a claim within the exclusive jurisdiction of the federal courts.

II. RESPONDENT'S ARGUMENT THAT ADMINISTRATIVE ADJUDICATIONS ARE NOT ENTITLED TO FULL FAITH AND CREDIT IS CONTRARY TO THE PURPOSE OF THE FULL FAITH AND CREDIT CLAUSE AND IS NOT SUPPORTED BY DECISIONS OF THIS COURT.

To avoid the mandate of full faith and credit in this case, respondent relies on what he concedes is simply a "literal reading" of the full faith and credit statute, 28 U.S.C. § 1738 (1982). Respondent's literal reading of § 1738 ignores the consistent holdings of this Court and the very purpose of the full faith and credit clause.

The purpose of the full faith and credit clause is "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Milwaukee County v. M. E. White Co.*, 296 U.S.

268, 276-77 (1935); see *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). By virtue of the constitutional provision and its implementing statute, state policies with respect to the effect of judgments rendered within a state are made a part of national jurisprudence. See *Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942). The purpose of full faith and credit unquestionably cannot be accomplished, therefore, unless *every* judicial proceeding which is entitled to preclusive effect in the rendering state is afforded full faith and credit by *every* other state and federal tribunal. Respondent's argument for an artificial distinction between types of judicial proceedings is in complete derogation of the very purpose of full faith and credit.

In addition to contradicting the notions of comity embodied in the full faith and credit clause, an artificial distinction between agency and court adjudications would intrude deeply into the sovereignty properly reserved to each state under fundamental principles of federalism. Under our federal scheme of government, each state is free to exercise its judicial power through its courts, or if it sees fit, through its executive and administrative agencies. See generally Restatement (Second) of Conflict of Laws §§ 24, 92 (1971). Under respondent's interpretation of full faith and credit, however, a state's exercise of its judicial power through its agencies would be impeded by the fact that the judgments of its agencies, unlike those of its courts, would not be entitled to full faith and credit. Respondent's reading of full faith and credit would also mean that state agency adjudications would be entitled to no preclusive effect even though federal agency adjudications undeniably are entitled to preclusive effect under this Court's holding in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966). There are no critical differences between state and federal agency adjudications which justify affording preclusive effect to one but not the other.

Because administrative agencies did not exist when the full faith and credit statute was first enacted, the absence of any express reference to agencies is in no way indicative of a congressional intention to exclude agencies from the operation of the full faith and credit statute. The nonsensical results produced by a literal reading of § 1738 further belie any such congressional intention. For, not only would state agency adjudications be entitled to no full faith and credit in state and federal court proceedings, but also state and federal court adjudications would be entitled to no full faith and credit in state and federal agency proceedings. These irrational results demonstrate the critical importance of applying principles of full faith and credit in a manner which accomplishes the constitutional purpose. That purpose can be accomplished only by affording full faith and credit to the judicial proceedings of every state tribunal empowered by state law to adjudicate disputes and entitled by state law to preclusion effect in the state's own courts.

The irrational meaning of full faith and credit produced by the literal reading of § 1738 urged by respondent and his amicus, the Equal Employment Opportunity Commission (EEOC), no doubt accounts for this Court's repeated pronouncement that issues adjudicated by a state agency are entitled to full faith and credit. In *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), and *Chicago R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926), this Court rightly refused to adopt the artificial distinction which respondent and the EEOC now urge this Court to draw between agency adjudications and court adjudications for full faith and credit purposes. Speaking for the plurality in *Thomas* and citing *Schendel*, Justice Stevens unequivocally acknowledged that the issues adjudicated by a state agency are entitled to full faith and credit: "To be sure, . . . the factfind-

ings of state administrative tribunals are entitled to the same res judicata effect in the second state as findings by a court." 448 U.S. at 281.

Ignoring this statement and its supporting authority, respondent cites Justice Stevens' immediately subsequent reference to "the critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority." *Id.* at 281-82. What respondent fails to recognize, however, is that the "critical differences" referred to by the plurality in *Thomas* had nothing at all to do with issue preclusion, but were relied upon instead to fashion the position that an agency adjudication will not preclude the subsequent assertion of a *claim* the agency was not empowered to adjudicate:

Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.

Id. at 282-83.

More importantly, however, the five concurring and dissenting members of this Court in *Thomas* expressly refused to embrace the plurality's distinction between courts of general jurisdiction and administrative agencies even for claim preclusion purposes. Speaking for the concurring justices, Justice White said, "I do not see any overriding differences between workmen's compensation awards and court judgments that justify different treatment for the two." *Id.* at 289. Speaking for the dissenters, Justice Rehnquist also eschewed the plurality's denial of claim preclusion effect to the administrative adjudication, noting that the claimant "was free to choose the applicable law simply by choosing the forum in which he filed his initial claim." *Id.* at 294. The disagreement among members of this Court over the claim preclusion effect of worker compensation awards does not detract in the least from the unanimous agreement among mem-

bers of this Court that full faith and credit is due a state agency's adjudication of issues within the scope of its authority.

Implicit in the argument of respondent and the EEOC that § 1738 only requires federal courts to afford full faith and credit to state court judgments is the suggestion that Congress intended a limited application of full faith and credit in federal courts. This suggestion cannot be reconciled with this Court's decision in *Thomas* or with the purpose of full faith and credit. Underlying each of the separate opinions in *Thomas*, which was decided under § 1738, is the presumption that § 1738 requires federal courts to give full faith and credit to state agency adjudications. The adjudication in question was conducted by a state agency, and the second forum was the District of Columbia, a federal jurisdiction. Respondent's argument that § 1738 does not require federal courts to extend full faith and credit to state agency adjudications simply cannot withstand this Court's pronouncements in *Thomas*.⁴ Furthermore, consistent with the purpose of full faith and credit, Congress did not provide for one effect in state courts and another effect in federal courts. Rather, Congress provided that judicial proceedings are entitled to the same full faith and credit whether the subsequent action is in state or federal court.

⁴ This Court is the final arbiter of the scope of full faith and credit. See *Thomas*, 448 U.S. at 271; *Magnolia*, 320 U.S. at 438. Pursuant to that role, this Court has determined that full faith and credit extends to state agency adjudications. This Court's pronouncements in *Thomas* are controlling, therefore, even though agencies are not specifically mentioned in § 1738. As explained by Justice Stevens in *Thomas*, "Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation." 448 U.S. at 272 n.18, citing *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932), in which this Court extended full faith and credit to state "Acts" even though § 1738 did not include an express reference to state "Acts" until amended in 1948.

In support of his argument that the full faith and credit statute applies only to state court judgments, respondent cites the decisions of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980), *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), *Migra v. Warren City School District*, 465 U.S. 75 (1984), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), none of which holds that § 1738 applies only to state court judgments. *McDonald*, for example, held that collective bargaining arbitration is not a "judicial proceeding" and therefore not entitled to full faith and credit under § 1738. *Allen*, *Migra*, and *Kremer*, on the other hand, did not even present the question of whether § 1738 applies to state agency proceedings but rather whether the Reconstruction statutes or Title VII in some manner repeal the full faith and credit due state court proceedings. Interestingly enough, however, this Court's statement in footnote 7 of *Kremer* appears premised on the assumption that full faith and credit does apply to agency adjudications. Otherwise, there would have been no reason to suggest in footnote 7 that Title VII's "substantial weight" requirement with respect to the findings of state deferral agencies may constitute an implied repeal of the full faith and credit due deferral agency decisions.

In full faith and credit cases decided in each of the last two terms, this Court reversed decisions of the Seventh and Eleventh Circuits for failing to apply the rules of preclusion of the state in which a judgment was rendered. See *Parsons Steel, Inc. v. First Alabama Bank*, — U.S. —, 106 S. Ct. 768 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, — U.S. —, 105 S. Ct. 1327 (1985). In *Parsons*, Justice Rehnquist warned against giving "unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act," 106 S. Ct. at 771, and quoting *Kremer*, reminded the courts of appeals that "§ 1738 does not allow federal courts to employ their

own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.' " *Id.* at 771-72. In the absence of any express or implied repeal of the full faith and credit statute, therefore, the obligation of the Sixth Circuit in this case was clear: to give the agency adjudication the same issue preclusion effect it enjoys in Tennessee's own courts. The Sixth Circuit's failure even to consider Tennessee law of preclusion in this case requires that its judgment be reversed.

III. RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE RECONSTRUCTION STATUTES IMPLIEDLY REPEAL THE FULL FAITH AND CREDIT DUE A STATE AGENCY ADJUDICATION.

In *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School District*, 465 U.S. 75 (1984), this Court unequivocally held that neither the language nor legislative history of § 1983 suggests any congressional intention to repeal the statutory command of full faith and credit. Respondent, however, does not address the *Allen* and *Migra* holdings or even attempt to demonstrate any manner in which the Reconstruction statutes impliedly repeal the full faith and credit due a state agency adjudication. Instead, respondent relies on dissenting and concurring opinions from three decisions of this Court—*Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), and *Patsy v. Board of Regents*, 457 U.S. 496 (1982)—not one of which involved a question of full faith and credit.

Patsy, the most recent decision cited by respondent, held that exhaustion of state administrative remedies is not a prerequisite to instituting a federal court action under § 1983. The fact that respondent was not required to litigate any issue of race discrimination in the state

agency makes the application of issue preclusion in this case particularly compelling. If respondent desired one unencumbered opportunity to litigate his claims under the Reconstruction statutes in federal court, it was available to him before and at all times during the agency adjudication. Instead of pursuing his federal court action, however, respondent voluntarily departed from the available federal forum, submitted the issue of race discrimination to adjudication in the state agency, and pursued the agency adjudication to final judgment.⁵ Only after losing the issue of race discrimination in the agency adjudication did respondent return to federal court and seek to litigate the issue again. Having freely chosen the state agency as the forum in which to litigate the issue, however, respondent should not be allowed to avoid the issue preclusion effect of the agency's judgment.

IV. RESPONDENT HAS FAILED TO DEMONSTRATE THAT TITLE VII IMPLIEDLY REPEALS THE FULL FAITH AND CREDIT DUE A STATE AGENCY ADJUDICATION VOLUNTARILY INVOKED BY RESPONDENT OUTSIDE THE TITLE VII ENFORCEMENT SCHEME.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982), this Court extended to Title VII actions the holding in *Allen* that "an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." Finding no express re-

⁵ The district court's order withdrawing any restraint on employment action against respondent (Dist. Ct. Nr. 14, filed Mar. 29, 1982) certainly cannot be construed as compelling respondent to invoke the agency adjudication in the first place, to litigate issues relevant to his civil rights claims there, or to pursue it to final judgment. Nor did the district court's order stay the proceedings in federal court. Respondent was free at all times, therefore, to pursue his civil rights claims in federal court. He chose instead to pursue the state agency proceedings to final judgment.

peal of full faith and credit in Title VII, this Court went on to reaffirm the "cardinal principle of statutory construction that repeals by implication are not favored" . . . and whenever possible, statutes should be read consistently." *Id.* Because no language in Title VII required *Kremer* to pursue in state court the unfavorable decision by the Title VII state deferral agency and because no language in Title VII prescribes the effect of a state court judgment, this Court held that Title VII does not impliedly repeal the full faith and credit due a state court judgment.

A straightforward application of the reasoning in *Kremer* requires the same conclusion with respect to a state agency adjudication voluntarily invoked by an employee in a purposeful departure from the Title VII enforcement scheme. No language in Title VII required respondent in this case to invoke the due process hearing or to litigate any issue of race discrimination there. No language in Title VII prescribes the effect of the agency adjudication voluntarily invoked by respondent. Nor does the legislative history of Title VII include any reference to the effect of adjudications by agencies other than state antidiscrimination agencies. Neither the language nor the legislative history of Title VII therefore proves any congressional intention to repeal the full faith and credit due an agency adjudication outside the Title VII enforcement scheme.

In an effort to avoid the application of this Court's reasoning in *Kremer*, respondent and the EEOC rely on footnote 7 in *Kremer* to support their position that state agency adjudications are never entitled to preclusive effect in subsequent Title VII actions. Respondent and the EEOC further argue that if Congress intended to repeal the full faith and credit due a state deferral agency decision, it surely must have intended also to repeal the full faith and credit due an agency adjudication outside the Title VII enforcement scheme.

The issue of whether Title VII impliedly repeals the full faith and credit due state deferral agency decisions has not been decided by this Court and is not presented in this case. If the "substantial weight" provision of Title VII were construed as an implied repeal of full faith and credit as to state deferral agencies, however, the congressional purpose would be easily perceived. Because Congress required Title VII claimants to submit their claims of employment discrimination initially to state deferral agencies—thus depriving them of the initial choice of forum—Congress provided that the decisions of those agencies would be entitled to "substantial weight," but not preclusive effect, in subsequent EEOC proceedings. When, as in this case, a claimant freely chooses the initial forum, the critical policy considerations are radically different and demand that the claimant be bound by the results of his chosen forum. See *Thomas*, 448 U.S. at 289-90 (White, J., concurring); *id.* at 294 (Rehnquist, J., dissenting).

Respondent's arguments might have some force if litigation of the issue of race discrimination somehow had been thrust upon respondent against his will. Respondent alone, however, created the circumstance dictating the application of issue preclusion in this case. He voluntarily invoked a state agency adjudication outside the Title VII enforcement scheme and insisted that the issue of alleged racial motivation for his proposed termination be adjudicated there. If respondent wished to pursue a due process hearing to contest his proposed termination prior to or simultaneously with pursuit of his Title VII action, he could have avoided preclusion quite simply by limiting the agency's adjudication to the issues of his work performance and behavior. Having freely chosen to litigate the issue of alleged discriminatory intent in the due process hearing and having lost the issue in the forum of his choice, respondent should not be permitted to avoid the effect of the agency's finding on his Title VII claim.

Respondent's and the EEOC's reliance on the decisions of this Court in *Chandler v. Roudebush*, 425 U.S. 840 (1976), *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in support of their argument that a state agency adjudication is never entitled to preclusive effect in a subsequent Title VII action, is seriously misplaced. All three cases are plainly inapposite to the questions presented here. In *Kremer* this Court explicitly described the *McDonnell Douglas* and *Chandler* decisions as holding "that the 'civil action' in federal court following an EEOC decision was intended to be a trial *de novo*." 456 U.S. at 477. Because the principles of full faith and credit are not implicated in the case of two federal forums, this Court concluded that neither case was dispositive of the full faith and credit question presented in *Kremer*. *Id.* For the same reason, neither is dispositive or even instructive in this case.

This Court also rejected *Kremer*'s reliance on the *Gardner-Denver* decision because arbitration decisions are not subject to the mandate of full faith and credit. Addressing specifically the *Gardner-Denver* finding of "the inappropriateness of arbitration as a forum for the resolution of Title VII issues," *id.* at 478, this Court explicitly stated that the "characteristics [of arbitration] cannot be attributed to state administrative boards and state courts." *Id.* Respondent's argument that state agency adjudications should be treated like arbitration proceedings for full faith and credit purposes was unmistakably rejected by this Court in *Kremer*. Respondent's argument also completely ignores that the state agency in this case was exercising the state's judicial power in a manner prescribed by state law and for the purpose of ensuring that respondent's proposed termination was not in violation of constitutional and statutory provisions. See Tenn. Code Ann. § 4-5-322(h) (1) (1985). Unlike arbitration under a collective bargaining agree-

ment, the adjudication in this case was undeniably a state judicial proceeding controlled, not by the intent of the parties, but by governing federal and state law.

While perfunctorily dismissing the critical policy considerations supporting the application of full faith and credit to agency adjudications provided by state law for the express purpose of protecting Fourteenth Amendment liberty and property interests, the EEOC makes the inexplicable argument that applying issue preclusion to the agency adjudication in this case would "upset the division of labor between the EEOC and state FEP agencies currently achieved through worksharing arrangements." (EEOC Br. at 26) This argument completely ignores that the question presented in this Court is whether issue preclusion should apply to an agency adjudication voluntarily invoked by an employee *outside* the Title VII enforcement scheme. Employees are not required to submit their Title VII claims to state agencies other than § 706 deferral agencies established by state law to provide remedies for employment discrimination. Nor does the EEOC enter into worksharing agreements with agencies other than § 706 deferral agencies. Affording full faith and credit to issues adjudicated by agencies outside the Title VII enforcement scheme would have no effect, therefore, on the EEOC's worksharing agreements or on any other aspect of the statutory enforcement scheme, including the full use of state antidiscrimination remedies. For the same reasons, the EEOC's argument that application of preclusion principles would generate confusion and provide a trap for unwary claimants is decidedly unconvincing. There certainly can be no confusion as to those state agencies which are mandatory deferral agencies and those which are not. When an employee purposefully departs from the Title VII enforcement scheme, as respondent did in this case, he is fairly bound by the findings of his chosen forum. Application of issue preclusion is particularly imperative when the forum chosen by the employee is provided by state law for the express purpose of pro-

protecting Fourteenth Amendment liberty and property interests. Denial of issue preclusion would render the state adjudication futile and seriously undermine its integrity.

Conspicuously absent from respondent's argument, as well as that of the EEOC, is any suggestion that the issue of alleged racial motivation for respondent's proposed termination was not properly before and within the scope of the agency's adjudicatory authority. Indeed, once respondent raised the issue of alleged discrimination as an affirmative defense to his proposed termination, the Administrative Law Judge was required to determine the issue. See Tenn. Code Ann. § 4-5-322(h)(1) (1985). Also conspicuously absent from respondent's argument and that of the EEOC is any response to this Court's holding in *Marrese v. American Academy of Orthopaedic Surgeons*, — U.S. —, 105 S. Ct. 1327 (1985), that absent an exception to the full faith and credit statute, state law determines the issue preclusion effect of a prior state judgment even if it involves a claim within the exclusive jurisdiction of the federal courts. There is neither an express nor an implied exception in Title VII to the obligation of a federal court to extend full faith and credit to state agency adjudications voluntarily invoked outside the Title VII enforcement scheme. Therefore, even though the agency in this case did not have jurisdiction to determine respondent's Title VII claim, Tennessee law properly determines the issue preclusion effect of the agency adjudication. The Sixth Circuit's refusal to follow the mandate of full faith and credit by applying Tennessee rules of preclusion to the agency adjudication in this case requires reversal of the judgment below.

CONCLUSION

The Sixth Circuit's judgment should be reversed and this case remanded for a determination of the issue preclusion effect to which the agency adjudication in this case is entitled under Tennessee law and the effect of issue preclusion on respondent's claims under the Reconstruction statutes and Title VII.

Respectfully submitted,

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No. 85-588

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October Term, 1985

THE UNIVERSITY OF TENNESSEE, et al.
Petitioners

v.

ROBERT B. ELLIOTT
Respondent

ON WRIT OF CERTIORARI TO THE
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FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE STATE OF
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QUESTION PRESENTED

Whether traditional principles of preclusion apply in an action under section 1983, Title VII, and other civil rights statutes, to preclude issues fully and fairly litigated before a state administrative agency acting in a judicial capacity to protect Fourteenth Amendment liberty and property interests of state employees.

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AMICUS CURIAE BRIEF FOR THE STATE OF
KANSAS AND OTHER JOINING STATES

INTEREST OF AMICUS CURIAE STATES

This case focuses on the preclusive effect, in a subsequent section 1983 or Title VII civil rights action, of a prior state administrative adjudication conducted to protect Fourteenth Amendment liberty and property interests of aggrieved state employees whose interests

are threatened by state agency action. The State of Kansas and the other states, joining as amici curiae, maintain administrative forums which, acting in a judicial capacity, provide a full and fair trial-type hearing in which to contest disciplinary action proposed or taken against state employees. Pursuant to state law, these administrative judgments are entitled to preclusive effect in the courts of the amici curiae states and should be entitled to full faith and credit in federal courts pursuant to the requirements of Art. IV § 1 of the Constitution and 28 U.S.C. § 1738.

On behalf of the various state agencies, whose defense in these administrative decisions must be borne by the Attorneys General of the amici curiae states, the State of Kansas and the joining states assert their vitally important interests as amici curiae in the question presented in this case that full faith and credit be applied to the trial-type administrative tribunals of these states established to conduct their required duty under the Fourteenth Amendment to

resolve disputes between state agencies and their employees involving constitutionally protected interests.

ARGUMENT

FULL FAITH AND CREDIT APPLIES WITHOUT EXCEPTION IN SECTION 1983 AND TITLE VII CASES TO THE ISSUES FULLY AND FAIRLY LITIGATED BY STATE AGENCY ADJUDICATIONS ESTABLISHED UNDER THE 14th AMENDMENT.

- A. Denial of Full Faith and Credit Will Seriously Threaten State Administrative Functions.

In Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972), this Court mandated that "[w]hen protected [Fourteenth Amendment] ... interests are implicated," by state agency action, "the right to some kind of prior hearing is paramount." This mandate was extended in Loudermill v. Cleveland Bd. of Educ., ___ U.S. ___, 105 S.Ct. 1487 (1985) to require a hearing prior to state agency action which threatens constitutionally protected rights.

The legislatures of the amici curiae states have established various statutory

administrative forums in which the state employee, or state prisoner, is entitled to a full formal, trial-like, evidentiary due process hearing. These administrative trials established for purposes of protecting Fourteenth Amendment interests--and not as Title VII, section 706(c) deferral agencies under the EEOC/ deferral agency investigatory scheme-- should be entitled to preclusive effect in subsequent section 1983 and Title VII federal civil rights actions to the same extent as they are entitled to preclusion in the courts of the amici curiae states. Denial of full faith and credit not only will undermine the repose and finality of these administrative judgments but will also erode the ability of states to administer themselves with confidence. Such a denial will also call into serious question the efficacy and viability of modern state administrative agencies to implement legislative and executive duties and goals delegated to these agencies, absent which state governments, in this complex technological information era of conflicting and

interconnected interests, cannot adequately function. The ability to relitigate the same issues de novo in federal court effuses the initial administrative adjudicatory process with futility. Virtually all such administrative judgments are potentially reviewable either under section 1983 or Title VII; therefore, a denial of preclusion to issues tried by state agencies poses a serious threat to the administrative functions of state government.

- B. This Court Has Recognized No Exception In Subsequent Section 1983 Or Title VII Actions For Applying 28 U.S.C. § 1738 To Issues Decided In These Agency Decisions.

The Full Faith and Credit Clause of Art. IV, § 1 of the Constitution is applicable to the federal courts by 28 U.S.C. § 1738 which requires that "[t]he ... judicial proceedings of any such State ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of any such State ... from which they are taken." This

Court has ruled previously that section 1983 and Title VII federal civil rights actions are not categorically exempt from application of section 1738. See Allen v. McCurry, 449 U.S. 90 (1980); Migra v. Warren City School District, 465 U.S. 75 (1984); Kremer v. Chemical Construction Co., 456 U.S. 461 (1982). This Court has also ruled that there is no express repeal of section 1738's application in either section 1983 or Title VII; nor has this court found any implied repeal or exception to section 1738 unless footnote 7 of Kremer can possibly be read to be an exception as to section 706 deferral agencies under the Title VII administrative investigation and enforcement scheme. See 456 U.S. at 470 n.7.

But the state agencies whose adjudications are in question here are not the section 706 deferral agencies of these amici curiae states but rather those agencies outside the Title VII enforcement scheme, and established instead to protect Fourteenth Amendment interests, before which state employees may raise discrimination issues, not discrimination

claims, as a defense to the disciplinary charges against the employee. When a state employee chooses to invoke the trial-like agency adjudications, which the state is burdened with providing, then the issues decided by the state agency should be entitled to issue preclusion under Art. IV § 1 and 28 U.S.C. § 1738 even though the agency is not established to try and resolve section 1983 and Title VII claims.

The Sixth Circuit's refusal to grant issue preclusion is not only inconsistent with that Circuit's prior decision in Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 559 n. 12, (6th Cir. 1983), aff'd, _____ U.S. _____, 105 S.Ct. 1487 (1985) but also inconsistent with this Court's recent interpretation of Kremer in Marrese v. American Academy of Orthopaedic Surgeons, _____ U.S. _____, 105 S. Ct. 1327, 1332 (1985) that "absent an exception to § 1738, state law determines at least the issue preclusion effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts."

Moreover, the Sixth Circuit's conclusion "that state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court" is inconsistent with this Court's decisions which require that state agencies give due process hearings in the first place in order to protect Fourteenth Amendment interests. Elliott v. University of Tennessee, 766 F.2d 982, 992 (6th Cir. 1985). This lack of trust also conflicts with Allen and Migra in which this Court clearly indicated its confidence in the ability of state judicial proceedings to protect constitutional rights.

The Sixth Circuit's decision indicates a basic distrust of the state administrative adjudicatory process. However, no longer is it questioned that "when an agency conducts a trial type hearing, makes findings, and applies the law, the reasons for treating its decision as res judicata are the same as the reasons for applying res judicata to a decision of a court that used the same procedure." K. Davis, Administrative Law

Treatise, § 21:2 (1983); see generally Restatement of Judgments (Second) § 83 (1982). Indeed, this Court's decision in United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), that trial-like agency adjudication is entitled to preclusive effect, has been applied in hundreds of state court decisions and in all of the courts of appeal.

Moreover, this Court has never had any trouble in applying full faith and credit to state administrative adjudications. See Thomas v. Washington Gas Light Co., 448 U.S. 201 (1980); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943); Chicago R.I. & P.Ry. v. Schendel, 270 U.S. 611 (1926). Clearly, what comprises a state "judicial proceeding" within the meaning of Art. IV, § 1 and 28 U.S.C. § 1738 is not self-defining but is dependent upon state law. In Riley v. New York Transit Co., 315 U.S. 343, 349 (1942), this Court noted that Art. IV, § 1 makes each state's preclusion rules "a part of national jurisprudence," requiring courts to look to the law of the originating state to determine if the

decision under review is entitled to preclusion.

The legislatures of each state have power to provide when their administrative agencies will act in a judicial capacity. This point is well illustrated in Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842 (7th Cir. 1985) in which the Seventh Circuit distinguished the full trial-like hearing provided by the State of Illinois with the much less formal agency hearing in Kremer. The thrust of Buckhalter is that the judicial capacity of the state agency under the Illinois statute, unlike the Kremer hearing, was so formal and trial-like that common law preclusion was applicable, under the administrative res judicata doctrine of Utah Construction. When Buckhalter's common law preclusion analysis is applied to agencies outside of Title VII, i.e., non-deferral agencies, it becomes readily apparent there is no reason to apply only common law preclusion but that 28 U.S.C. § 1738 statutory full faith and credit preclusion also applies. After all, since the

underlying purpose of the Full Faith and Credit Clause was to constitutionalize as national policy the applicability of a state's traditional common law preclusion principles of res judicata and collateral estoppel, then it is clear that the common law preclusion rules applied by Buckhalter are the same rules to be applied under section 1738 in order to determine the preclusive effect of a prior state decision.

The reasons that this Court cited in Allen v. McCurry for applying section 1738--promoting the comity between state and federal courts, avoiding the cost and vexation of multiple lawsuits, conservation of judicial resources, prevention of inconsistent decisions, and the repose achieved from reliance on adjudication--are fully applicable to trial type state agency adjudications and should be applied to prevent litigation of issues already decided between the parties.

C. Issue Preclusion In This Case Will Resolve A Dilemma Faced By The States.

The amici curiae states face the dilemma of wasting the time, effort, and

resources in providing trial-like agency due process hearings to protect Fourteenth Amendment interests and then have federal district courts wipe out the previous hearing by de novo review on the same issues in subsequent section 1983 and Title VII actions. Many states provide full trial-like hearings under the state administrative procedure act, modeled after the Uniform Law Commissioners' Model Administrative Procedures Act. Other states like Kansas have a civil service statute which includes due process hearing provisions.

Under the Kansas Civil Service Act, state employees are provided with the full range of due process protections: notice, right to be heard, to be represented by counsel, to present evidence, to compel attendance of witnesses, and to cross-examine opposing witnesses K.S.A. 75-2929(d). The employee may defend against the disciplinary action on the issue that the reasons are "political, religious, racial," K.S.A. 75-2949(a), "national origin, ancestry ... age, sex or physical disability." K.A.R. 1-19-

18(c), (d). The employee has the right to apply for an administrative rehearing K.S.A. 75-2929e(c), and the right to appeal an adverse decision to Kansas district courts K.S.A. 60-2101(d); Thompson v. Amis, 208 Kan. 658, 493 P.2d 1259 (1972), the Kansas Court of Appeals, and the Kansas Supreme Court.

Kansas law says the Kansas Civil Service Board acts in a judicial capacity in its decisions. Gawith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169, 476 P.2d 966 (1970). A decision by the Commission becomes a final judgment upon the running of the appeal period. State ex rel. Sanborn v. Unified School District, 218 Kan. 47, 542 P.2d 664 (1975). The relief ordered by such final order would be enforceable in Kansas courts, the issues decided could not be collaterally attacked, and Kansas courts would embrace the final administrative decision, after time for appeal expires, as a full-fledged court judgment. The Tenth Circuit, applying Kansas law, recognizes this. Rawlings v. United States, 686 F.2d 903 (10th Cir. 1982);

Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir. 1972), cert. denied, 375 U.S. 942 (1963).

However, in two unreported decisions, one by each of the federal district judges in the District of Kansas, different results have occurred in subsequent civil rights actions. In one, the court granted preclusive effect to the Kansas Civil Service Commission decision. In the second case, the Court granted no full faith and credit to the commission's decision.

Collateral attack of these issues is not allowed in Kansas court. Hutchinson National Bank & Trust Co. v. English, 209 Kan. 127, 130 (1972). The collateral attack invited in federal district court under section 1983 and Title VII is inconsistent with this Court's caution in Marrese that district courts may not, consistent with section 1738, elect to grant either more or less preclusive effect than would the state courts. 105 S. Ct. at 1332-1335. The district court's role, absent an exception to 1738, is to determine what the state

court's would do when confronted with an identical situation, then do that. See Carpenter v. Reed, ex rel. Dept. of Public Safety, 757 F.2d 218, 219 (10th Cir. 1985).

The dilemma faced by the State of Kansas as to the final effect of adjudications by its Civil Service Commission is being faced, in differing scenarios but the same plot, by the other amici curiae states. The granting of issue preclusion to such agency decisions will resolve the dilemma and continue to leave the federal district courts as final enforcers of civil rights claims. Collateral estoppel precludes the relitigating of issues properly before and actually tried by the agency. Therefore, applying issue preclusion has the following positive results: If the employee raises the issue of discrimination as a defense and prevails before the agency, the state is bound by those issues decided, and the employee can proceed to federal court to obtain supplemental relief under section 1983 or Title VII. If the employee raises the issue of discrimination as a

defense but fails, he is precluded from relitigating that issue.

Application of issue preclusion in these instances will provide repose to final state administrative adjudications and will restore confidence to state agencies that issues already decided by their adjudications will not be overturned in the future by an inconsistent federal court factfinding on the identical issues. The civil rights litigant will still have access to the federal courts on his section 1983 or Title VII claims. The federal district courts, however, will be relieved of the burden of retrying issues already fully litigated. Conservation of judicial resource will result as well as fulfillment of the national policies of comity and federalism which are the foundation of full faith and credit.

Conclusion

For the reasons stated, this Court should reverse the Court of Appeal's

decision and should apply full faith and credit to the issues fully and fairly litigated in the agency decision in this case.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,
Petitioners,
v.

ROBERT B. ELLIOTT,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE UNIVERSITY OF TENNESSEE

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-588

THE UNIVERSITY OF TENNESSEE, *et al.*,
v. *Petitioners*,
ROBERT B. ELLIOTT,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL
IN SUPPORT OF THE UNIVERSITY OF TENNESSEE

The Equal Employment Advisory Council respectfully submits this brief amicus curiae on behalf of the University of Tennessee, seeking reversal of the decision below. The parties' written consents to file this brief have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies,

procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various federal and state equal employment laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant case, *i.e.*, whether a final decision by a state administrative agency acting in a judicial capacity, finding no merit to claims of discrimination, bars a subsequent federal court action under Title VII and 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, which raises the same issues of employment discrimination.

Because of its interest in the res judicata effect of prior state court and administrative decisions, EEAC filed an amicus brief in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Texas*

Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *I.U.E. Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

STATEMENT OF THE CASE

On December 18, 1981, plaintiff Robert Elliott, a minority employee of the University of Tennessee Agricultural Extension Service, was advised by the University that he was to be terminated from his job because of inadequate job performance and behavior and incidents of gross misconduct. On December 22, 1981, Elliott filed an administrative appeal under the Tennessee Uniform Administrative Procedures Act. On January 5, 1982, he filed a federal complaint under Title VII and 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988.

Pursuant to the state administrative appeal procedure, set forth in the Contested Case Provisions of the Tennessee Uniform Administrative Procedures Act (UAPA), Tenn. Code Ann. § 4-5-301, an administrative judge conducted a lengthy due process hearing into Elliott's charges, during which the parties were accorded complete trial rights. Elliott's counsel examined nearly 100 witnesses at the hearing and insisted that evidence of alleged racial discrimination be admitted. The administrative judge found that the University's action was based on inadequate job performance and behavior rather than racial discrimination.

Elliott appealed these findings to the University of Tennessee Vice President for Agriculture, who con-

cluded that the actions of the University were not racially motivated and rejected the appeal. Elliott failed to file a petition for review of the administrative judge's decision in the state courts within sixty days of the order, a right provided in the state statute. Instead, eighty-four days after the final administrative order, Elliott renewed his federal complaint and requested a temporary restraining order, claiming that the final administrative order was arbitrary, retaliatory, wrongful, illegal, harassing, unnecessary and damaging to his reputation. The University opposed this motion and filed a motion for summary judgment.

The district court granted the University's motion for summary judgment, holding that it was precluded by principles of res judicata from reviewing the issues fully litigated in the administrative hearing. The court noted that exclusive jurisdiction to judicially review the merits of a final order entered in a UAPA contested case is vested in the Tennessee chancery courts under Tenn. Code Ann. § 4-5-322. *United Inter-Mountain Telephone Co. v. Public Service Commission*, 555 S.W.2d 389 (Tenn. 1977). Elliott, however, did not seek judicial review of the final administrative decision in the Tennessee chancery courts, but instead renewed his action in federal court. The district court found that Elliott could not utilize the federal civil rights statutes to relitigate what he had litigated over a five-month period during the administrative hearing.

The United States Court of Appeals for the Sixth Circuit reversed, holding that unreviewed state administrative judgments are not entitled to preclusive effect in subsequent federal court actions under Title VII or sections 1981, 1983, 1985, 1986 and 1988.

SUMMARY OF ARGUMENT

The doctrine of res judicata mandates that a final, valid judgment, conclusive as to all matters of fact and law, acts as an absolute bar to a subsequent action between the same parties upon the same claim or demand. The related doctrine of collateral estoppel precludes relitigation of identical issues which are raised in subsequent suits involving the same parties or their privies. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979). These preclusion doctrines apply to administrative, as well as to judicial proceedings. As this Court stated in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 484 n.26 (1982):

Certainly, the administrative nature of the fact-finding process is not dispositive. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 . . . (1966), we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity." *Id.* at 422. . . .

Based on the principles enunciated by this Court in *Kremer*, the final administrative decision at issue in this case is entitled to preclusive effect. In *Kremer*, the Court held that full faith and credit principles, as codified in 28 U.S.C. § 1738, bar a Title VII lawsuit in federal court when the claim previously has been adjudicated by a state administrative agency and affirmed on appeal by a state court. The Court reasoned that the *opportunity* for judicial review, to ensure that the administrative decision was not arbitrary and capricious and that the claimant was not denied any procedural rights to which he was en-

titled, provided the necessary due process, thus justifying the application of full faith and credit.

In the instant case, the administrative and judicial procedures available to the plaintiff met the *Kremer* due process requirements. See *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 852 (7th Cir. 1985), *petition for cert. filed*, — U.S.L.W. — (U.S. —) (No. 85-6094). The parties had ample opportunity to gather and present evidence and were accorded full trial rights. Most importantly, Elliott had an opportunity to appeal the findings of the administrative judge in state court, although he declined to avail himself of this opportunity.

In addition, these administrative proceedings met the requirements set forth in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966), *i.e.*, the parties had an adequate opportunity to litigate disputed issues of fact before the administrative judge, who was acting in a judicial capacity. Therefore, the decision of the administrative judge, finding that Elliott did not meet his burden of proving discrimination, is entitled to preclusive effect. Accordingly, Elliott should be barred from litigating the same issues of race discrimination in a subsequent suit in federal court.

Finally, the decision of the administrative judge should be given preclusive effect to promote judicial finality and prevent needless litigation. Absent such a finding, parties would be unable to rely on prior adjudications, and litigation of the same claims and issues would continue *ad infinitum*.

ARGUMENT

I. TRADITIONAL PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL APPLY TO ADMINISTRATIVE PROCEEDINGS.

In this case, an administrative judge acting in a judicial capacity presided over a lengthy hearing in which over 100 witnesses testified and over 150 exhibits were entered into evidence. At this hearing, Elliott had ample opportunity to defend against charges brought by the University of Tennessee. As a defense against these charges, he introduced evidence of alleged race discrimination. All of this evidence was considered by the administrative judge in reaching his decision that the actions of the University were not based on race discrimination. Moreover, this decision was reviewed thoroughly by the Vice President for Agriculture at the University, who adopted the initial order of the administrative judge and determined, not only that the proposed termination of Elliott by the University was not based on race but also that Elliott had been afforded ample opportunity to defend himself against the charges brought by the University. Elliott now seeks to relitigate the same issues of employment discrimination in federal court. Clearly, *res judicata* principles should apply in this case to preclude such relitigation.

The judicial doctrine of *res judicata* mandates that a final, valid judgment on the merits of an action precludes the parties or their privies from relitigating the same claims or demands that were or could have been raised in the first action. *Allen v. McCurry*, 449

U.S. 90, 94 (1980).¹ 1B Moore's Federal Practice ¶ 0.405[1]. The related doctrine of collateral estoppel, "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."² *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (case citation omitted). See also *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) (Collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally."). "[C]ollateral estoppel treats as final only those questions actually and necessarily decided in a prior suit."

¹ The doctrine of res judicata has evolved primarily because of a recognition by the courts that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Association*, 283 U.S. 522, 525 (1931).

² In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (citations omitted), the Court distinguished between the doctrines of res judicata and collateral estoppel, stating as follows:

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

In this brief, when we refer to "principles of res judicata," we are referring generally to the doctrine of judicial preclusion, including collateral estoppel.

Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979) (case citations omitted). Unlike the doctrine of res judicata, application of collateral estoppel does not require identical causes of action. 1B Moore's Federal Practice ¶ 0.441[2].

These preclusion doctrines are applicable to administrative determinations. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 423 (1966), this Court found that the Court of Claims had failed to give finality to factual findings made by the Board of Contract Appeals, when the Board was acting in a judicial capacity. Reversing this portion of the Court of Claims decision, the Court noted that:

[T]he result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. *When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.*

Id. at 421-22 (footnotes & case citations omitted & emphasis added).³ See, e.g., *Hayfield Northern Rail-*

³ In refusing to apply res judicata principles to the administrative findings in this case, the Sixth Circuit stated that *Utah Construction* applies only to federal administrative decisions. *Elliott v. University of Tennessee*, 766 F.2d 982, 989 (6th Cir. 1985). According to the Sixth Circuit, "[t]he Court [in *Utah Construction*] did not address the deference that federal courts should give to the unreviewed findings of state administrative agencies in subsequent federal civil rights ac-

road Co. v. Chicago & North Western Transportation Co., — U.S. —, 104 S. Ct. 2610, 2619 n.15 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 484 n.26 (1982); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281 (1980) (“[T]he factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court.”).

Accordingly, this Court must determine whether the specific administrative decision at issue in this case is entitled to preclusive effect. Based on this Court’s decision in *Kremer*, we argue below that the administrative determination should be given preclusive effect, and thus should bar Elliott from relitigating the same issue of employment discrimination in federal court.

tions.” *Id.* (footnote omitted). This interpretation of *Utah Construction* is unduly narrow. As indicated above, the Court did not refer to state or federal administrative agencies, but simply to “an administrative agency.” *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). Moreover, many courts have applied *Utah Construction* to state administrative decisions. See, e.g., *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 849-53 (7th Cir. 1985), petition for cert. filed, — U.S.L.W. — (U.S. —) (No. 85-6094); *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985) (applying *Utah Construction*, Second Circuit held that state administrative hearing and appeal must be given preclusive effect in subsequent 42 U.S.C. § 1983 action).

II. THE DISTRICT COURT PROPERLY DISMISSED THE FEDERAL CAUSE OF ACTION, HOLDING THAT IT WAS PRECLUDED BY PRINCIPLES OF RES JUDICATA FROM REVIEWING ISSUES FULLY LITIGATED IN THE STATE ADMINISTRATIVE HEARING.

A. This Court’s Decision In *Kremer v. Chemical Construction Corp.* Supports The Application of Res Judicata Principles To The Final Decision Of The Administrative Judge.

1. Title VII Does Not Supersede The Judicial Doctrine of Res Judicata, As Codified In 28 U.S.C. § 1738.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 463 (1982), this Court was faced with the question of “whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738.” In holding that Title VII does not supersede section 1738,⁴ the Court reasoned that granting full faith and credit to a state court proceeding in no way hinders the enforcement of Title VII. The Court stressed that:

Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court. While striving to craft an optimal niche for the States in the overall enforcement

⁴ 28 U.S.C. § 1738 provides, in pertinent part, that:

The . . . judicial proceedings of any court of any such State * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

scheme, the legislators did not envision full litigation of a single claim in both state and federal forums.

Id. at 473-74.

Furthermore, the Court found that:

In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum Because there is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny *res judicata* or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits, [the plaintiff will be prohibited from relitigating his claim in federal court]."

Id. at 485.

Although the Court in *Kremer* had before it the specific question of whether a decision of an administrative agency which was affirmed by a state court would preclude a subsequent suit in federal court, the Court in no way found it dispositive that the agency decision was *actually reviewed* by a state court. Instead, the Court based its decision on the fact that *judicial review was available* to the plaintiff. *Id.* at 484. See *O'Hara v. Board of Education of Vocational School*, 590 F. Supp. 696, 701 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985) ("The important due process criterion is the *opportunity* to present one's evidence, and it is irrelevant that the party declined to take advantage of that opportu-

nity." (emphasis in original & case citations omitted)).

The Court stressed that in determining whether to apply full faith and credit in any given situation, all of the procedures provided by state law must be taken into consideration. The Court specifically pointed out that "this panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause" and that "[c]ertainly, the administrative nature of the factfinding process is not dispositive." *Kremer*, 456 U.S. at 484 & n.26 (footnote & case citation omitted).

We maintain that section 1738 should apply in this case to preclude relitigation of the factfindings of the state administrative agency acting in its judicial capacity. However, even if section 1738 did not apply, as the Seventh Circuit noted in *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 849 (7th Cir. 1985), *petition for cert. filed*, — U.S.L.W. — (U.S. —) (No. 85-6094):

[T]he inapplicability of section 1738 does not end our *res judicata* analysis. In footnote 26 of the *Kremer* opinion the Supreme Court acknowledged the doctrine of "administrative *res judicata*," stating that "so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, *res judicata* is properly applied to decisions of an administrative agency acting in a 'judicial capacity.'" 456 U.S. at 485 [sic] n.26. . . .

(citation omitted).

The *Kremer* opinion clearly mandates that the total state procedure provided to a plaintiff be considered in determining whether a state court or ad-

ministrative decision should be granted preclusive effect. 456 U.S. at 483-85. Therefore, in the instant case, the paramount question is whether Elliott was denied any of the procedural rights to which he was entitled, including the right of judicial review to assure that the administrative decision was not arbitrary and capricious. As discussed below in Part B, Elliott was not denied any of the procedural rights to which he was entitled. Although he was entitled to judicial review, he opted not to pursue it. His failure to avail himself of such review, however, does not render the state's procedures inadequate and therefore incapable of supporting an application of res judicata. *Id.* at 485.

2. *Kremer Does Not Preclude Application Of Res Judicata Principles To An Unreviewed Decision Of An Administrative Agency Acting In A Judicial Capacity.*

In holding that the decision of the administrative judge was not entitled to preclusive effect, the Sixth Circuit indicated that the decision in *Kremer* stands for the proposition that unreviewed state administrative determinations are not entitled to deference under res judicata principles. *Elliott v. University of Tennessee*, 766 F.2d 982, 988 (6th Cir. 1985). The Sixth Circuit stated as follows:

[T]he *Kremer* Court itself made plain in footnote 7 that its rule of non-preclusion with respect to unreviewed state administrative decisions applies to the decisions of those agencies that have full enforcement authority and provide full adjudicative procedures as well as to the decisions of agencies that lack those attributes.

Id. This interpretation does not comport with the holding in *Kremer*, nor with established principles of res judicata.

Footnote seven reads as follows:

EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions *Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC.* Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.

456 U.S. at 470 (citations omitted & emphasis added). It is clear, when this footnote is read in context with the remainder of the *Kremer* decision, that the Supreme Court did not hold that state administrative determinations may not be given preclusive effect. Rather, as the Seventh Circuit explained in *Buckhalter*, 768 F.2d at 854:

In footnote 7, the Supreme Court was clearly referring to the state administrative agency in its investigatory capacity as it analogized the state agency to the EEOC, a Federal agency that is authorized to act only in an investigatory capacity. The import of footnote 7 is that neither an investigatory determination of the EEOC nor an investigatory determination of a state administrative agency precludes a trial *de novo* in Federal court. The Supreme Court made clear, however, in footnote 26 of the *Kremer* opinion, that when the state administrative agency acts in a judicial capacity, its ruling on the claim of employment discrimination is entitled to preclusive

effect in the Federal court under the doctrine of "administrative *res judicata*."

The Seventh Circuit's interpretation is clearly correct. In commenting on the preclusive effect to be given to administrative decisions, footnote seven in *Kremer* was addressing the situation of state agencies exercising limited functions like those given the EEOC, and not state agencies acting in judicial capacities. The EEOC is empowered only to investigate complaints and decide whether to press charges based upon its investigations. Title VII does not give the EEOC any powers to adjudicate claims and render decisions regarding the guilt or innocence of Title VII defendants. State agencies, on the other hand, often have both investigatory and court-like enforcement authority and consequently can both press charges and adjudicate cases, thus establishing the existence or non-existence of a violation of the state's anti-discrimination laws. Such state agencies, therefore, are capable of making two very distinct types of decisions which should not be casually lumped together to support the argument that federal courts must grant *de novo* trials to plaintiffs whose claims have been adjudicated and dismissed at the state administrative level.

It is clear that decisions of the EEOC do not preclude *de novo* trials in federal courts, and it is likewise true that administrative decisions of state agencies which are similar to those of the EEOC, *i.e.*, decisions pertaining to whether to press charges, also should not be given preclusive effect in federal court. Decisions by state agencies acting in their judicial capacity, however, do not fall within the scope of this footnote. Because the administrative judge in this case was clearly acting in a judicial capacity, *see* dis-

cussion in Part B, and had full enforcement authority and adjudicative powers, his decision is entitled to *res judicata* effect.

B. Because The Administrative Judge Was Acting In A Judicial Capacity When He Conducted The Due Process Hearing Which Resolved Disputed Issues Of Fact Properly Before Him And The Parties Had An Adequate Opportunity To Litigate Those Issues, Principles Of *Res Judicata* Bar A Subsequent Suit In Federal Court.

1. *The Decision Of The Administrative Judge Should Be Given Collateral Estoppel Effect.*

In order for a federal court to give collateral estoppel effect to a state administrative determination, the following requirements must be satisfied:

- (1) The administrative judge must have acted in a judicial capacity;
- (2) The administrative judge must have resolved disputed issues of fact properly before him;
- (3) The parties must have had a full and fair opportunity to litigate; and
- (4) The state courts would hold that the state administrative decision should be given preclusive effect.

O'Hara v. Board of Education of the Vocational School, 590 F. Supp. at 701. As shown below, each of these requirements has been met in this case. Accordingly, this Court should find that the decision of the state administrative agency that the actions taken by the University against Elliott were not based on race discrimination, is entitled to collateral estoppel effect.

We note that, in this case, the application of collateral estoppel will operate as a complete bar to the federal action because the administrative judge's finding that the University's actions were not based on race discrimination is determinative of the controversy in the second suit. *Id.* (court held that finding of administrative law judge, affirmed by Commissioner of Education, that plaintiff's discharge was warranted, was entitled to collateral estoppel effect, and thus barred Title VII action); see 1B Moore's Federal Practice ¶ 0.441[2].

2. *The Administrative Judge Was Acting In A Judicial Capacity When He Conducted The Administrative Hearing And Issued The Final Decision In This Case.*

"[I]t [is] clear that issues of fact determined by an administrative agency *acting in a judicial capacity* may collaterally estop future relitigation of administratively determined issues." *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982) (emphasis added) (citing *Utah Construction*, 384 U.S. at 422). Courts have found administrative agencies to be acting in a judicial capacity where the proceeding was adversarial and the parties were represented by counsel, presented evidence and arguments, submitted briefs, and had an opportunity to seek judicial review. See, e.g., *Buckhalter*, 768 F.2d at 851-52 (Human Rights Commission found to be acting in judicial capacity where proceeding conducted just as a trial in Illinois state court); *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 746 F.2d 375, 378 (7th Cir. 1984); *Groom v. Kawasaki Motors Corp., USA*, 344 F. Supp. 1000, 1002 (W.D. Okla. 1972).

To determine whether the administrative judge was acting in a judicial capacity in this case, it is necessary to examine the Tennessee Uniform Administrative Procedures Act (UAPA) and the actual administrative proceeding. Section 4-5-301 of the UAPA sets forth the procedures to be followed in hearing a contested case. Pursuant to these administrative procedures, parties are afforded complete trial rights, including the right to be represented by counsel, to receive notice of the hearing, to file pleadings, motions, briefs, and proposed findings of fact and conclusions of law, to request the administrative judge to issue subpoenas, and to examine and cross-examine witnesses. Tenn. Code Ann. §§ 4-5-305 to -312. The parties in this case were afforded these rights.

In addition, the administrative judge presided at the hearing, ruled on questions of the admissibility of evidence and swore witnesses. *Id.* at § 4-5-301(b). The parties had ample opportunity, not only to litigate the disputed issues of fact, but also to seek state court review of the final administrative decision. *Id.* at § 4-5-322. Elliott presented more than ninety witnesses and cross-examined some of the agency's witnesses for more than thirty hours each. Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (Appendix to Petition at A31. The initial order of the administrative judge was a ninety-six page document and contained extensive findings of fact and conclusions of law, as required under Tenn. Code Ann. § 4-5-314(c). *Id.* It is clear that the administrative judge was acting in a judicial capacity when he conducted the hearing and issued the decision in this case.

3. Factfindings Of The Administrative Judge Are Entitled To Preclusive Effect.

"[T]he factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281 (1980) (citing *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611 (1926) (Iowa state compensation award based on factual finding that employee engaged in *intrastate* commerce precluded subsequent claim under Federal Employer's Liability Act brought in Minnesota state courts which would have required finding that employee engaged in *interstate* commerce)). Factfindings by state administrative tribunals are entitled to the same res judicata effect in federal court. *O'Connor v. Mazullo*, 536 F. Supp. 641, 643-44 (S.D.N.Y. 1982) (factual determinations of motive by state agency entitled to collateral estoppel effect in later suit in federal court).

Accordingly, the factual findings of the administrative judge in this case, *i.e.*, that the actions taken by the University were not based on racial discrimination,⁵ are entitled to preclusive effect in the federal court action.

⁵ The administrative judge made the following factual determination:

An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing charges against employee, resulting in these proceedings were based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the

4. The Record Clearly Shows That The Respondent Had A Full And Fair Opportunity To Litigate The Issue Of Race Discrimination Before The Administrative Judge.

In order for a final administrative decision to be given preclusive effect, the parties must have had a full and fair opportunity to litigate. *See Kremer*, 456 U.S. at 481-82 & cases cited therein. "[N]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Id.* at 483 (case citations omitted). Administrative proceedings which provide for an opportunity informally to present charges against an employer on the record, including submitting exhibits, testimony, and rebuttal evidence, with access to attorney assistance and compulsory process, meet the requirements of due process when judicial review is available to determine that no procedural rights were denied and that the agency decision was not arbitrary and capricious. *Id.* at 483-84; *Buckhalter*, 768 F.2d at 852.

The proceedings under the Tennessee Uniform Administrative Procedures Act satisfy due process requirements. As discussed above, the UAPA provides parties with notice, opportunity to be heard, representation at a party's own expense by counsel, full opportunity to file pleadings, motions, objections and offers of settlement, as well as briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders. At the request of any party,

claim of racial discrimination as a defense to the charges against him.

Appendix to Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at A177.

the administrative judge also shall issue subpoenas and effect discovery. Further, at the hearing, the parties are afforded the opportunity to respond, present evidence and argument, cross-examine witnesses and submit rebuttal evidence. At the conclusion of the hearing, the administrative judge must render an initial order, which becomes final unless reviewed by the agency. Finally, a person aggrieved by the final order is entitled to judicial review in chancery court. Tenn. Code Ann. §§ 4-5-301 to -322.

In this case, "a UAPA hearing was convened in Jackson, Tennessee, on April 26, 1982. It continued with various recesses until its conclusion five months later on September 29, 1982. The administrative record consists of 55 volumes of transcript containing over 5,000 pages of the testimony of over 100 witnesses and 153 exhibits." Appendix to Petition at A27. Initial review of the administrative judge's order was conducted by the agency. Although Elliott failed to avail himself of state court review, "[t]he fact that [he] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer*, 456 U.S. at 485.

Because Elliott had a full and fair opportunity to litigate the issue of race discrimination in the administrative proceedings, his due process rights have been satisfied and the final administrative decision should be given preclusive effect.

5. Tennessee Courts Would Give Preclusive Effect To The Final Administrative Decision.

In determining whether to grant preclusive effect to the administrative decision in this case, a federal court should examine the rules of res judicata chosen

by the state of Tennessee. *O'Hara v. Board of Education of the Vocational School*, 590 F. Supp at 701; *Kremer*, 456 U.S. at 485; cf. *Allen v. McCurry*, 449 U.S. at 96 ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. . . .").

The doctrine of res judicata applies to final orders of administrative agencies in Tennessee. *Purcell Enterprises, Inc. v. State*, 631 S.W.2d 401, 407 (Tenn. App. 1981) (citing *Polsky v. Atkins*, 197 Tenn. 201, 206, 270 S.W.2d 497, 499 (1954)). See also *Fourakre v. Perry*, 667 S.W.2d 483, 486 (Tenn. App. 1983) ("Appellee concedes in his brief that a final decision of an administrative agency creates estoppel under the doctrine of Res Judicata.").

As the Tennessee Supreme Court observed in *Cantrell v. Burnett & Henderson Co.*, 187 Tenn. 552, 216 S.W.2d 307, 309 (1948) (quoting 30 Am. Jur. at pp. 920-21):

It is a fundamental principle of jurisprudence that material facts or questions, which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies . . . whether the subsequent action involves the same or a different form or proceedings, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action.

In the instant case, because the administrative judge determined that Elliott's allegations of race dis-

crimination were without merit and Tennessee courts would consider this issue conclusively settled, the federal action based on the same allegations of discrimination also is barred by principles of res judicata.⁶

C. Principles Of Res Judicata Must Be Applied To Encourage Judicial Finality And To Avoid Multiple Litigation.

"The policy considerations which underlie res judicata—finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense—are as relevant to the administrative process as to the judicial." *Painters District Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081, 1084 (5th Cir. 1969) (cases citations omitted). As this Court pointed out in *Kremer*, the opportunity to litigate a claim one time fully and fairly is all that is required by Title VII. 456 U.S. at 473-74. If this Court were to uphold the decision of the Sixth Circuit, it would drastically weaken the foundation of the *Kremer* opinion, because it would allow plaintiffs to litigate their claims of discrimination fully in state administrative forums and then, if they are not satisfied with the results, to go into federal court and begin litigation anew. Such a decision would, in practical terms, preclude employers from winning at the state level, because they could only win the opportunity to start defending all over again in federal court.

⁶ See *Barnes v. Oody*, 514 F. Supp. 23, 25 (E.D. Tenn. 1981) (district court held that where truth of charges of sexual harassment established by administrative tribunals, subsequent action for defamation barred; collateral estoppel prevented relitigation of whether plaintiffs guilty of sexual harassment).

In *Aponte v. National Steel Service Center*, 500 F. Supp. 198, 204 (N.D. Ill. 1980), the United States District Court for the Northern District of Illinois commented on this problem, stating that:

The tangled relationship between one employee and his employer, relating solely to the continued employment relationship, has been the subject of an arbitration, an FEPC proceeding carried through the administrative process to settlement, an EEOC proceeding carried through the administrative process to settlement, subsequent administrative proceedings which led to the conclusion that the claims did not have a reasonable basis, the filing of a federal court action, appointment of counsel, and the filing of amended pleadings resting upon Title VII, § 1981 of the Civil Rights Acts, age discrimination legislation and Illinois law.

And, years later, we have only resolved the pleading questions.

We have created an administrative, legislative and judicial labyrinth which serves no one well. * * * The aggrieved employee has multiple avenues to pursue, all strewn with technical obstacles and all of which may postpone any possible relief into the indefinite future. The result is a festering sense of injustice. The employer settles one claim and finds itself faced with a variety of others, all requiring it to employ professional help to guide it through, and to preserve its rights, in the various proceedings in which it finds itself a target.

Clearly, in these situations, principles of res judicata are properly invoked to "relieve parties of the cost and vexation of multiple lawsuits, conserve ju-

dicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. at 94 (case citation omitted).

This Court should reiterate that litigation ad infinitum benefits no one. A party who has had an opportunity to litigate an issue of race discrimination fully and fairly to a final decision should be required to live with that decision. Another opportunity to litigate the same issue is not required by Title VII and certainly should not be created by this Court.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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9

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, ET AL., PETITIONERS

v.

ROBERT B. ELLIOTT

**ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE SUPPORTING RESPONDENT**

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QUESTION PRESENTED

This brief will address the following question:

Whether a federal court adjudicating a Title VII action must give preclusive effect to a judicially unreviewed decision of a state administrative agency finding no employment discrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-588

THE UNIVERSITY OF TENNESSEE, ET AL., PETITIONERS

v.

ROBERT B. ELLIOTT

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICUS CURIAE SUPPORTING RESPONDENT**

**INTEREST OF THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

The Equal Employment Opportunity Commission (EEOC) is the federal agency primarily responsible for administering federal fair employment statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Among other responsibilities, it reviews employment discrimination determinations by state fair employment practice (FEP) agencies in accordance with Section 706(b) of Title VII. 42 U.S.C. 2000e-5(b). The EEOC believes that petitioners' position in this case—urging that in adjudicating Title VII actions federal courts must give res judicata effect to judicially unreviewed state agency

decisions—is inconsistent with Title VII, could undermine private enforcement, and would interfere with the EEOC's exercise of its statutory responsibilities.¹

STATEMENT

1. On December 18, 1981, petitioner University of Tennessee notified respondent, a black employee of the University's Agricultural Extension Service, that he would be discharged for inadequate job performance and misconduct. Respondent filed an appeal of the termination decision under the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101 *et seq.* (1985), which provides a public employee with an administrative review of his proposed discharge. Shortly thereafter, respondent filed suit against petitioners in the United States District Court for the Western District of Tennessee, alleging that the proposed termination was racially motivated and therefore violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Respondent also raised federal civil rights claims under 42 U.S.C. 1981, 1983, 1985, 1986 and 1988. The district court stayed the federal action pending completion of respondent's state administrative challenge to the dismissal. See Pet. App. A1-A4.

An administrative law judge (ALJ) conducted the state administrative proceeding.² The ALJ dis-

¹ The EEOC takes no position on the preclusive effect of state administrative agency decision in suits brought under 42 U.S.C. 1981, 1983, 1985, 1986 and 1988.

² The state administrative review process is described by the court of appeals (Pet. App. A4-A5). See generally Symposium, *Tennessee Administrative Law*, 13 Mem. St. U. L. Rev. 461 (1983). It provides the basic elements of an adjudicative procedure, including right to counsel, right to request issuance of subpoenas and the right to examine and

claimed jurisdiction to adjudicate respondent's affirmative claim for violation of his civil rights. However, the ALJ concluded that he could consider respondent's allegations of employment discrimination as an affirmative defense to the University's charges of inadequate job performance and misconduct (Pet. App. A44-A45). After a lengthy hearing, the ALJ sustained four of the University's eight claims of improper and inadequate performance (*id.* at A166-A170), ruling further that respondent "failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him" (*id.* at A177). The ALJ concluded, however, that respondent should be transferred rather than discharged (*id.* at A177-A182).

Respondent, in accordance with Tennessee law, requested review of the ALJ decision by the appropriate University of Tennessee official. See Tenn. Code Ann. § 4-5-315 (1985). That official, the Vice President for Agriculture, sustained the ALJ's ruling (Pet. App. A33-A35). Neither petitioners nor respondent exercised their statutory right under Tenn. Code Ann. § 4-5-322 (1985) to seek state court review (Pet. App. A6).

2. Following the state administrative decision, respondent renewed his federal court action. Petitioners then moved for summary judgment, arguing, *inter alia*, that under *res judicata* principles the state administrative finding of no discrimination precluded respondent's Title VII claims. The district court granted petitioners' motion, concluding that the ad-

cross-examine witnesses on the record. Under Tennessee law, the ALJ must be an employee of either the affected state agency or the secretary of state. See Tenn. Code Ann. § 4-5-301 (1985).

ministrative finding should be given preclusive effect (Pet. App. A26-A32).³

The court of appeals reversed, holding that res judicata principles did not bar respondent's Title VII action. It relied upon this Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), which "drew a sharp distinction between state court judgments, which are entitled to deference under the res judicata principles of [28 U.S.C.] 1738, and unreviewed state administrative determinations which are not." Pet. App. A11. The court of appeals rejected petitioners' contention that *Kremer's* statements concerning the nonpreclusive effect of state administrative decisions applied only to agencies with investigative, rather than adjudicative, authority, noting that *Kremer's* statements were accompanied by citations to decisions involving state adjudicative agencies (*id.* at A12).

The court of appeals also rejected petitioners' contention that *Kremer*, by citing *United States v. Utah*

³ The preclusive effects of former adjudication "are referred to collectively by most commentators as the doctrine of 'res judicata,'" which itself is often analyzed by reference to two concepts: claim preclusion and issue preclusion. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984). "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Ibid.* "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Ibid.* In this case, petitioners urge that issue preclusion should result from the agency's finding of no discrimination. Pet. Br. 26-27 n.11. In arguing that judicially unreviewed state administrative decisions should have no preclusive effect in Title VII actions, we use the more general terms "preclusive effect" and "res judicata" throughout this brief.

Construction & Mining Co., 384 U.S. 394 (1966), implicitly recognized that res judicata principles should be applied to administrative agencies. The court observed that *Kremer's* sole reference to that case occurred in the course of examining the adequacy, for due process purposes, of New York's judicial review procedures (Pet. App. A12-A13). The court stated that "[t]he district court's holding that [respondent's] Title VII claim is barred by res judicata must fall in light of the unambiguous principle enunciated in *Kremer*" (*id.* at A13).⁴

SUMMARY OF ARGUMENT

This Court held in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), that the full faith and credit statute, 28 U.S.C. 1738, requires that a federal court adjudicating a Title VII action give preclusive effect to a state court judgment affirming a state administrative agency's rejection of an employment discrimination claim. However, the Court also stated that federal court resolution of a Title VII claim is not precluded by unreviewed administrative decisions "even if such a decision were to be

⁴ The court of appeals also held that the administrative decision should not preclude respondent's claims under 42 U.S.C. 1983, and by analogy, his claims under Sections 1981, 1985, 1986, and 1988. The court concluded that the full faith and credit statute, 28 U.S.C. 1738, applies only to state court judgments (Pet. App. A16) and that, therefore, the appropriate inquiry in this case was whether the federal courts should create a federal common law rule according preclusive effect to unreviewed administrative determinations when adjudicating Section 1983 actions (Pet. App. A17). The court held that the underlying policies of Section 1983 counselled against giving state administrative determinations preclusive effect (*id.* A19-A22).

accorded preclusive effect in a State's own courts" (456 U.S. at 470 n.7). *Kremer's* reasoning controls the present case. The federal courts may consider respondent's Title VII claim, notwithstanding a prior state administrative determination, unreviewed by the state courts, that petitioner did not engage in employment discrimination.

Under *Kremer*, a federal court adjudicating a Title VII claim must give the same preclusive effect to a state court determination of employment discrimination that the determination would receive in the state's own courts. But as *Kremer* implicitly recognized, the full faith and credit statute governs only the res judicata effect of "judicial proceedings of any court" (28 U.S.C. 1738). It does not control the res judicata effect of a state administrative decision that received no review from the state's judiciary.

As *Kremer* also recognized, Title VII, in both its structure and purpose, cannot be squared with a rule giving preclusive effect to state administrative determinations. Section 706(c) of Title VII clearly contemplates that the EEOC will often defer its examination of a Title VII claim pending the state's fair employment practice (FEP) agency consideration of the dispute. See 42 U.S.C. 2000e-5(c). And Section 706(b) specifies that EEOC shall accord "substantial weight"—not preclusive effect—to the FEP agency decision. 42 U.S.C. 2000e-5(b). "EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions." *Kremer*, 456 U.S. at 470 n.7.

Petitioners concede that state FEP agency determinations may be nonpreclusive, but suggest that

preclusive effect should nevertheless be given to determinations by other state agencies that, in the course of their administrative proceedings, address employment discrimination claims. However, *Kremer* drew no such distinction. The opinion specifically cites court of appeals decisions involving both FEP and non-FEP agencies to illustrate the nonpreclusive effect of state administrative determinations. Certainly, Congress did not intend that the federal courts, in implementing the important national policy of non-discrimination, would be bound by findings of various state non-FEP agencies with little or no expertise in employment discrimination matters.

Indeed, this Court's decisions have repeatedly recognized that federal courts may give de novo consideration to Title VII claims notwithstanding prior non-judicial decisions rejecting discrimination claims. See *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For example, the Court held in *Chandler* that a federal court may adjudicate a federal employee's Title VII claim, notwithstanding the employing agency's prior administrative decision rejecting the employee's discrimination claim. Similar principles should control the Title VII claims of non-federal employees, including state and local employees who contest their discharge through state administrative procedures that result in incidental adjudication of employment discrimination claims.

Policy considerations also argue against application of "administrative res judicata" in the Title VII context. If state agency determinations of employment discrimination are given preclusive effect, claimants may choose to forego altogether state ad-

ministrative procedures protecting important rights. This result would weaken state administrative systems, diminish state participation in employment discrimination issues, and harm the federal-state cooperation achieved by worksharing agreements between EEOC and FEP agencies. Furthermore, it would increase the workload of the federal courts and the EEOC. The potential inefficiencies in nonpreclusion are easily exaggerated. Claimants who have lost their discrimination claims after a full hearing before a state agency are likely to be circumspect in seeking a full-scale federal adjudication. Furthermore, federal review, when it does occur, should be able to be conducted more expeditiously after an administrative proceeding. The issues generally have been narrowed, the need for discovery should be lessened, and the administrative record may be admitted as evidence entitled to appropriate weight.

ARGUMENT

A FEDERAL COURT ADJUDICATING A TITLE VII ACTION SHOULD NOT GIVE RES JUDICATA EFFECT TO A JUDICIALLY UNREVIEWED DECISION OF A STATE ADMINISTRATIVE AGENCY

I. The Full Faith and Credit Statute Does Not Require Federal Courts to Give Judicially Unreviewed State Administrative Decisions Res Judicata Effect

The Full Faith and Credit Clause empowers Congress to determine whether federal courts shall be bound by state judicial proceedings.⁵ Congress, in

⁵ The Full Faith and Credit Clause provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws

turn, has enacted the full faith and credit statute, 28 U.S.C. 1738, which entitles the "judicial proceedings of any court of any such State" to "full faith and credit" in the federal courts.⁶ Section 1738 requires "federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). Congress, through the full faith and credit statute, has thus expressed a general federal respect for state court decisions.⁷

This Court concluded in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), that Congress

prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Art. IV, § 1. Congress, of course, is under no obligation to give state proceedings binding effect in the federal courts. See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 483 n.24 (1982); *Davis v. Davis*, 305 U.S. 32, 40 (1938).

⁶ Section 1738 provides in pertinent part:

The records and judicial proceedings of any court of any such State, Territory or Possession * * * shall be proved or admitted in other courts within the United States and its Territories and Possessions [upon proper authentication].

Such * * * records and judicial proceedings * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

⁷ See, e.g., *Parsons Steel Co. v. First Alabama Bank*, No. 84-1616 (Jan. 27, 1986), slip op. 5; *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 462-463, 466 n.6 (1982); *Davis v. Davis*, 305 U.S. 32, 40 (1938); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813).

intended that federal courts adjudicating Title VII actions would give preclusive effect to state court judgments affirming state administrative agency determinations of employment discrimination claims.⁸ The Court determined that Title VII did not contain an express or implied repeal of Section 1738's requirement that "all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts." *Kremer*, 456 U.S. at 462-463. It found no "manifest incompatibility between Title VII and § 1738" that would demonstrate Congress's intention "to override the historic respect that federal courts accord state court judgments." 456 U.S. at 470-472.

The issue in the present case is whether federal courts adjudicating Title VII actions must give preclusive effect to *judicially unreviewed* state administrative determinations of employment discrimination claims. The full faith and credit statute has no application in this context. Section 1738, by its express terms, applies only to the "judicial proceedings of any court." 28 U.S. 1738. Congress, by its plain language, has given preclusive effect only to

⁸ The petitioner in *Kremer* had filed a religious discrimination charge with the New York State Division of Human Rights, a recognized state FEP agency entitled to deferral under Section 706(c), 42 U.S.C. 2000e-5(c). The agency determined that there was no probable cause to believe that the petitioner's employer had engaged in religious discrimination in violation of New York's employment discrimination statute. 456 U.S. at 464. The petitioner then sought judicial review, and the New York state courts affirmed the state agency's decision. *Ibid.* This Court concluded that the state court's affirmance of the state agency's decision precluded petitioner from raising an identical Title VII claim of religious discrimination.

state court judgments; Section 1738 does not extend that effect to state administrative decisions.

The reference to "any court" is express and unambiguous; there is little need to peer behind those words and into the legislative history. See *United States v. Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 11; *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). In all events, the legislative history confirms that the term "any court" refers to traditional courts rather than administrative bodies.⁹ This Court has never held that Section 1738 requires that federal courts give res judicata effect to state administrative determinations.¹⁰ Moreover, the lower fed-

⁹ The full faith and credit statute was first enacted in 1790. See Act of May 26, 1790, ch. XI, 1 Stat. 122 *et seq.*, and the subsequent amendments have been minor; see Act of Mar. 27, 1804, ch. 56, 2 Stat. 298 *et seq.*; Act of June 25, 1948, ch. 646, § 1738, 62 Stat. 947. See generally Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith & Credit*, 58 Ind. L.J. 59, 66 n.36 (1982). Notably, Congress chose the operative words "any court" nearly 200 years ago, long before the appearance of administrative agencies and notions of administrative res judicata. See 4 K. Davis, *Administrative Law Treatise* § 21.2 (1983). It is, of course, immaterial that there are now state administrative bodies that conduct quasi-judicial activities; the scope of Section 1738 is controlled by the intent of Congress at the time of the statute's enactment. See *Board of Governors v. Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986).

¹⁰ This Court *has* held that Section 1738 does *not* apply to collective bargaining arbitration because that dispute resolution mechanism "is not a 'judicial proceeding.'" *McDonald*, 466 U.S. at 288. Petitioners suggest (Pet. Br. 23-24) that Section 1738 should apply to state administrative proceedings, quoting dicta from the plurality in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 443 (1943). The quoted statement, an ambiguous passage from a subsequently criticized decision

eral courts generally have agreed that Section 1738 does not confer preclusive effect on state administrative decisions.¹¹

Thus, it is clear that the full faith and credit statute, which held controlling importance in *Kremer*, has no application in this case.

concerning the obligation among the states to give full faith and credit to state workmen's compensation programs, has no controlling force in this case. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 280-286 (1980) (plurality opinion) (suggesting that *Magnolia Petroleum* should be overruled).

¹¹ Although the Sixth Circuit and the Seventh Circuit disagree whether federal courts adjudicating Title VII actions should give preclusive effect to judicially unreviewed administrative decisions, they do agree that Section 1738 cannot resolve the issue. See Pet. App. A16; *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 849 (7th Cir. 1985), petition for cert. pending, No. 85-6094 (filed Dec. 23, 1985). Other courts have either suggested or concluded that Section 1738 does not apply to administrative determinations. See, e.g., *Holley v. Seminole County School District*, 763 F.2d 399, 400 (11th Cir. 1985); *Burney v. Polk Community College*, 728 F.2d 1374, 1380 (11th Cir. 1984); *Gargiul v. Tompkins*, 704 F.2d 661, 666-667 (2d Cir. 1983); *Moore v. Bonner*, 695 F.2d 799, 800-801 (4th Cir. 1982); *Mitchell v. National Broadcasting Co.*, 553 F.2d 265, 276 (2d Cir. 1977); *Parker v. National Corporation for Housing Partnerships*, 619 F. Supp. 1061, 1064-1065 (D.D.C. 1985), appeal docketed, No. 85-5985 (D.C. Cir. Oct. 4, 1985); *Chatelain v. Mount Sinai Hospital*, 580 F. Supp. 1414, 1417 (S.D.N.Y. 1984); *King v. City of Pagedale*, 573 F. Supp. 309, 313 (E.D. Mo. 1983). Although several courts have reached a contrary conclusion, their analysis of Section 1738 is summary and does not withstand close scrutiny. See *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985); *O'Hara v. Board of Education*, 590 F. Supp. 696, 701 (D.N.J. 1984), aff'd mem., 760 F.2d 259 (3d Cir. 1985).

II. A Judicially Fashioned Rule Giving Res Judicata Effect to State Administrative Decisions Would Be Inconsistent With Title VII

Since Congress has not required federal courts to give full faith and credit to state administrative decisions, "any rule of preclusion would necessarily be judicially fashioned." *McDonald*, 466 U.S. at 288. But judicial creation of such a rule in Title VII cases would conflict with the language and structure of Title VII and would be inconsistent with this Court's past interpretation of that statute.

Title VII plainly contemplates that state administrative proceedings will be used both as an initial enforcement mechanism and as a means of achieving non-judicial conciliation of Title VII disputes. Section 706(c) of Title VII gives states and localities that have enacted equal employment legislation a period of up to 60 days to attempt resolution of discrimination claims arising within their boundaries. 42 U.S.C. 2000e-5(c). Section 706(b) provides that if the employee is dissatisfied with the state FEP agency's resolution of his claim, he may request the EEOC to make an independent reasonable cause determination. 42 U.S.C. 2000e-5(b). Section 706(b) further specifies that EEOC shall accord "substantial weight"—not preclusive effect—to the FEP agency decision. *Ibid.*; see also 29 C.F.R. 1601.21(e), 1601.76 and 1601.77.¹² And Section 706(f) provides that once these proceedings have been invoked and have failed to resolve the dispute, the claimant may seek a judicial remedy. See 42 U.S.C. 2000e-5(f). Title VII thus "give[s] state agencies an opportunity to redress the evil at which the federal legislation was aimed,

¹² Similarly, the EEOC does not give preclusive effect to any administrative decisions of non-FEP state agencies.

and to avoid federal intervention unless its need [is] demonstrated." *Mohasco Corp. v. Silver*, 447 U.S. 807, 821 (1980) (footnote omitted). It plainly contemplates that the state agency may have the first opportunity to address employment discrimination claims. However, the statute's provisions for further federal review following a state agency's decision demonstrate that the agency's decision is not entitled to preclusive effect.

Kremer's analysis of the structure and purposes of Title VII provides powerful support for this conclusion. Although the Court did not speak unanimously in applying *res judicata* principles to state court judgments, the full Court did agree that state administrative decisions are not entitled to preclusive effect.¹³ The majority and dissenting opinions each recognized that according *res judicata* effect to unreviewed state administrative decisions would be antithetical to Title VII's statutory scheme and purposes. See 456 U.S. at 469-470; *id.* at 487 (Blackmun, J., dissenting); *id.* at 511 (Stevens, J., dissenting).

The Court observed that the "congressional directive that the EEOC should give 'substantial weight' to findings made in state proceedings" (456 U.S. at 470) could not be squared with a rule giving those same findings judicially preclusive effect, stating that "EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions."

¹³ See 456 U.S. at 470 n.7; *id.* at 487 (Blackmun, J., dissenting) ("a state agency determination does not preclude a trial *de novo* in federal district court) (emphasis in original); *id.* at 508-509 (Stevens, J., dissenting) ("state agency proceedings will not bar a federal claim under Title VII").

456 U.S. at 470 n.7. The Court concluded that it is not "plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC" (*ibid.*), stating further:

Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.

*Ibid.*¹⁴ Most lower courts, like the court below, have read *Kremer* as providing a bright-line distinction. They have generally concluded that state court judgments resolving employment discrimination claims are entitled to *res judicata* effect in accordance with state law, while unreviewed state agency determinations will not preclude Title VII claims.¹⁵ This interpretation is both sensible and correct.

¹⁴ The Court cited a series of court of appeals decisions in support of its conclusion. *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978); *Batiste v. Furnco Construction Corp.*, 503 F.2d 447, 450 n.1 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972); *Voutsis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972).

¹⁵ See, e.g., *Heath v. John Morrell & Co.*, 768 F.2d 245, 248 (8th Cir. 1985); *Bottini v. Sadore Management Corp.*, 764 F.2d 116, 120 (2d Cir. 1985); *Burney v. Polk Community College*, 728 F.2d 1374, 1379-1380 (11th Cir. 1984); *Pizzuto v. Perdue Inc.*, 623 F. Supp. 1167, 1174 (D. Del. 1985); *Reedy v. State of Florida, Dep't of Education*, 605 F. Supp. 172, 173-174 (N.D. Fla. 1985); *Mitchell v. Bendix Corp.*, 603 F. Supp. 920, 922 (N.D. Ind. 1985); *Parker v. Danville Metal Stamping Co.*, 603 F. Supp. 182, 188 (C.D. Ill. 1985); *Clinton*

Petitioners largely ignore *Kremer's* specific discussion of the non-preclusive effect of unreviewed administrative determinations in Title VII adjudications. Instead, they rely on general principles of "administrative res judicata." They maintain (Pet. Br. 25-27) that res judicata principles generally require that federal courts give preclusive effect to *all* state administrative adjudications.

This Court addressed the concept of administrative res judicata in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966). That case involved the interpretation of a federal government contract's dispute resolution provisions. The Court held that the contract's "disputes clause," which provided for administrative resolution of contract controversies through a federal agency's board of contract appeals, did not provide the exclusive means for resolving all contract disputes; instead, the contractor could seek judicial relief, as permitted by the Tucker Act and Wunderlich Act, in certain circumstances (384 U.S. at 403-418).¹⁶ The Court concluded, however, that

v. Georgia Ports Authority, 37 Fair Empl. Prac. Cas. (BNA) 593, 594 (S.D. Ga. 1985); see also *McCore v. Bonner*, 695 F.2d 799, 801 (4th Cir. 1982) (interpreting *Kremer* in a Section 1983 action); E.E.O.C. Dec. No. 86-4, at 5 (Dec. 6, 1985). But see *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, *supra*; *Parker v. National Corporation for Housing Partnerships*, *supra*; *Zywicki v. Moyness Products, Inc.*, 37 Fair Empl. Prac. Cas. (BNA) 710, 711 (E.D. Wis. 1985).

¹⁶ The Tucker Act, at that time, gave the Court of Claims jurisdiction over breach of contract actions. See 28 U.S.C. (1964 ed.) 1346(2). The Wunderlich Act accords finality to an agency decision "in a dispute involving a question arising under [a government] contract" unless the decision "is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 41 U.S.C. 321.

"[b]oth the disputes clause and the Wunderlich Act categorically state that administrative findings on factual issues relevant to questions arising under the contract shall be final and conclusive on the parties" (384 U.S. at 419 (footnote omitted)). The Court added (*id.* at 420):

[W]hen the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried *de novo* in the Court of Claims when the contractor sues for relief which the board was not empowered to give.

Petitioners suggest (Pet. Br. 25-26) that *Utah Construction* establishes a general rule requiring that federal courts give res judicata effect to all state administrative determinations. Plainly, they read far too much into that decision. *Utah Construction* addressed the res judicata implications of a specific federal agency's factual determinations under a particular statutory regime. While the Court noted that its decision "is harmonious with general principles of collateral estoppel," it specifically stated that "the decision here rests upon the agreement of the parties as modified by the Wunderlich Act." 384 U.S. at 421 (footnote omitted). The Court quite correctly gave the board of contract appeals' findings preclusive effect in light of the parties' contractual agreement to resolve disputes through that agency and the specific command of Congress—through the Wunderlich Act, 41 U.S.C. 321—that the agency's findings would be final.

Utah Construction indicates that in some circumstances the federal court should give preclusive effect

to federal administrative determinations, see 384 U.S. at 422, but it says nothing about application of administrative res judicata to state agency determinations.¹⁷ Furthermore, it indicates that the congress-

¹⁷ The decision whether administrative res judicata is warranted necessarily depends upon the circumstances presented. While petitioners cite (Pet. Br. 26 n.10) a series of cases recognizing the principle of administrative res judicata, none of those decisions support application of that principle in this case. Most of these cases involve questions pertaining to the preclusive effect of federal administrative decisions. *Delamater v. Schweiker*, 721 F.2d 50, 53-54 (2d Cir. 1983) (administrative decision to award social security benefits was not binding in subsequent agency adjudication); *United States v. Karlen*, 645 F.2d 635, 638 (8th Cir. 1981) (agency determination that an Indian lessee breached lease could have issue preclusive effect in subsequent federal suit seeking damages for lease breach); *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978) (federal court adjudicating a federal tort claim must give preclusive effect, as a matter of state law, to a federal agency finding that plaintiff violated federal aviation rules); *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 603 & n.17 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978) (declining to decide whether an agency must give collateral estoppel effect to its own prior determinations); *McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910, 913 (10th Cir. 1976) (agency factual determinations are binding in a subsequent agency proceeding); *Painters District Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081, 1083-1084 (5th Cir. 1969) (agency decision holding that union violated one section of a federal labor relations statute is binding in federal court action seeking damages under another section of the statute); *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 810 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969) (agency determination plaintiffs were not engaged in "foreign commerce" under one statute did not bar a federal court from inquiring whether plaintiffs engaged in "foreign commerce" under another statute). The other decisions involved the preclusive effect that state and District of Columbia adminis-

sional intent underlying the particular federal statutory regime at issue is central to the res judicata inquiry. *Id.* at 421 n.18.¹⁸ In *Utah Construction*, the Wunderlich Act supported an inference that preclusion was appropriate in the context of government contract disputes. As *Kremer* demonstrates, the structure and purposes of Title VII support an opposite inference in the context of employment discrimination disputes. 456 U.S. at 469-470; *id.* at 487-489 (Blackmun, J., dissenting); *id.* at 511 (Stevens, J., dissenting).¹⁹

trative bodies must accord the decision of another state administrative body. *United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249, 1255 (9th Cir. 1982) (declining to determine whether a state labor agency's decision is a "judgment" entitled to full faith and credit by another state); *Pettus v. American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), cert. denied, 444 U.S. 883 (1979) (holding that a state workmen's compensation agency's determination that employee was unjustified in refusing medical treatment was binding upon a District of Columbia workmen compensation board).

¹⁸ See also, e.g., *Chandler v. Roudebush*, 425 U.S. 840, 861-862 (1976); Restatement (Second) of Judgments § 83(3) and (4) (1982) (administrative res judicata is inappropriate where "the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim" or where application "would be incompatible with a legislative policy"); 4 K. Davis, *Administrative Law Treatise* § 21.5 (1983).

¹⁹ See also, e.g., *Chandler v. Roudebush*, 425 U.S. 840, 844-861 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-54 (1974); *Rosenfeld v. Department of Army*, 769 F.2d 237, 240 (4th Cir. 1985); 4 K. Davis, *supra*, § 21.5, at 62 ("The best example [of a statute embodying a policy against administrative res judicata] may be Title VII."); Catania, *Access to the Federal Courts for Title VII Claimants in the Post-*

Petitioners acknowledge (Pet. Br. 33-34) that Section 706(b) of Title VII instructs the EEOC to give "substantial weight" to final findings and orders of state FEP agencies when reviewing employment discrimination claims. 42 U.S.C. 2000e-5(b). They grudgingly concede (Pet. Br. 34) that Title VII "could be construed" to permit federal de novo review of state administrative decisions. However, they suggest (*ibid.*) that federal courts should nevertheless be required to give preclusive effect to decisions by non-FEP agencies.

Petitioners' position, which finds no support in Title VII precedent, is untenable. This Court, recognizing in *Kremer* that unreviewed state agency decisions are non-preclusive, did not distinguish between FEP and non-FEP agencies. Indeed, the Court supported its conclusion by citing, among other cases, *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978), a decision denying preclusive effect to a non-FEP agency.²⁰

Kremer Era: Keeping the Doors Open, 16 Loy. L.J. 209 (1985); Note, *Res Judicata Effects of State Agency Decisions in Title VII Actions*, 70 Cornell L. Rev. 695 (1985). Notably, while *Kremer* cited *Utah Construction* for the proposition that New York courts could, consistent with due process, give deference to administrative fact-finding, 456 U.S. at 484 n.26, it nowhere suggested that federal courts would be bound by unreviewed state administrative determinations.

²⁰ The facts in *Garner* are very similar to those in the instant case. The plaintiff, a city employee, had raised charges of racial discrimination before the New Orleans Civil Service Commission. That agency conducted an administrative hearing to assure that the plaintiff "had in fact breached police department regulations and had been dismissed for that reason and not because of racial discrimination." 571 F.2d at 1336. The court, following a careful analysis of administrative res judicata, concluded that the administrative decision was not entitled to preclusive effect. See *id.* at 1335-1338.

Since *Kremer*, other courts of appeals have refused to draw that distinction.²¹

Furthermore, petitioners' position is inconsistent with Title VII's statutory scheme. It would lead to the perverse result that federal courts must give preclusive effect to decisions by non-FEP agencies—which likely have little expertise in employment discrimination matters²²—while according only "substantial weight" to decisions by the states' expert FEP agencies. Certainly Congress, did not intend that the federal courts, in implementing the important national

²¹ See *Heath v. John Morrell & Co.*, 768 F.2d at 248; *Burney v. Polk Community College*, 728 F.2d at 1379-1380. Notably, the lone court of appeals in conflict with the decision below, *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, *supra*, relied on a different theory—apparently abandoned by petitioners—to give preclusive effect to a state agency determination. The court reasoned that administrative res judicata was appropriate because the state agency in that case acted in an "adjudicative," rather than an "investigative" capacity (768 F.2d at 854). That theory, like petitioners' theory, is infirm. It fails to recognize the important policy interests supporting federal de novo review in Title VII actions. In addition, *Kremer's* statements on the non-preclusive effect of state agency determinations were accompanied by citations to three cases—*Garner*, *Batiste v. Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), cert. denied, 30 U.S. 928 (1975), and *Cooper v. Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972)—that refused to provide preclusive effect to the decisions of adjudicatory agencies.

²² In this case the non-FEP agency was a state educational institution that was authorized by statute to conduct a hearing in response to a public employee's claim of wrongful discharge. Other non-FEP agencies likely to address employment discrimination claims include state and local civil service commissions (see, e.g., *Garner v. Giarrusso*, *supra*) and state unemployment compensation agencies (see, e.g., *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985)).

policy of nondiscrimination, would be bound by findings of the various state non-FEP agencies with little or no expertise in employment discrimination matters.

III. This Court Has Previously Denied Res Judicata Effect to Non-Judicial Decisions in Title VII Actions

This Court, recognizing the special role of the federal courts in adjudicating Title VII claims, has repeatedly refused to give res judicata effect to employment discrimination determinations by non-judicial entities. There is no reason to depart from those precedents in this case.

This Court's decision in *Chandler v. Roudebush*, 425 U.S. 840 (1976), is particularly relevant. The Court concluded that a federal court must provide a de novo adjudication of a federal employee's Title VII claim, notwithstanding the decisions of the Civil Service Commission and the employing agency rejecting the employee's charges.²³ The Court stated (*id.* at 848):

The legislative history of the 1972 amendments [to Title VII] reinforces the plain meaning of the statute and confirms that Congress intended to accord federal employees the same right to a trial *de novo* as is enjoyed by private-sector employees and employees of state governments and political subdivisions under the amended Civil Rights Act of 1964.

²³ In *Chandler*, a Veterans Administration employee alleging sex and race discrimination received a hearing before the agency's complaints examiner, followed by review within the agency and subsequent review by the Civil Service Commission. 425 U.S. at 842. The hearing was conducted as an adversarial adjudication. See *id.* at 863; see also 74-1599 Pet. App. 1a-17a; 74-1599 S.A. 15-44.

As this passage suggests, Congress intended that all employees, whether federal, state, or private-sector, would be entitled to a trial de novo in federal court despite their exercise of other federal and state administrative remedies. That symmetry, recognized in *Chandler*, should be respected here. Congress plainly did not intend that a federal employee would be entitled to a trial de novo following an unsuccessful administrative adjudication before his employing agency, but a state employee, such as respondent, should be denied a trial de novo based on the res judicata effect of an analogous administrative adjudication before his employing agency.²⁴

This Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), reflects a similar principle. The Court concluded that a federal court adjudicating a union employee's Title VII claim should not give preclusive effect to a prior arbitral decision rejecting the discrimination charge.²⁵ The Court rejected the notion that the employee's pursuit of his collective bargaining agreement remedy represented an election of remedies and waiver of his Title VII claim, noting that "[t]here is no suggestion

²⁴ Notably, Congress perceived that the "'entrenched discrimination in the Federal Service'" (*Chandler*, 425 U.S. at 841, quoting, H.R. Rep. 92-238, 92d Cong., 1st Sess. 24 (1971)) also existed in the state and local civil service. See H.R. Rep. 92-238, *supra*, at 17-18; S. Rep. 92-415, 92d Cong., 1st Sess. 9-11 (1971).

²⁵ The employee had filed a grievance under the collective bargaining agreement alleging that he was improperly discharged (415 U.S. at 39), ultimately claiming that his termination was racially motivated (*id.* at 42). The grievance proceeded to arbitration. The arbitrator ruled that the discharge was for "just cause," making no reference to the claim of racial discrimination (*ibid.*).

in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." 415 U.S. at 47. The Court stated that "in general, submission of a claim to one forum does not preclude a later submission to another" (*id.* at 47-48 (footnote omitted)), specifically observing that "[f]or example, Commission action is not barred by the 'findings and orders' of state or local agencies" (*id.* at 48 n.8). The parallels between *Alexander* and the present case are apparent. It would be incongruous if a union employee were entitled to pursue his Title VII remedy in federal court despite an adverse decision under the arbitration provisions of his collective bargaining agreement, but a state employee is precluded from pursuing his Title VII remedy by an adverse decision under state administrative proceedings governing review of discharge decisions. See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-799 (1973) (holding that an EEOC finding of no reasonable cause does not preclude federal de novo review of a discrimination claim).²⁶

In short, this Court has recognized that "Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal stat-

²⁶ Notably, petitioners rely on arguments similar to the "election of remedies" argument rejected in *Alexander*, suggesting (Pet. Br. 33) that respondent can preserve his Title VII remedy by foregoing his state administrative remedies. As *Alexander* explains, 415 U.S. at 47-54, an employee should not be forced to make that choice. "Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination." H.R. Rep. 92-238, 92d Cong., 1st Sess. 18-19 (1971).

utes." *Alexander*, 415 U.S. at 48 (footnote omitted). That principle is applicable in the present case. Respondent, a state employee, should be free to pursue his state law remedies in the state administrative forum without foreclosing his independent Title VII remedy.

IV. Petitioners' Suggested Policy Rationale for Preclusion Should Not Be Substituted for Title VII's Own Requirements and Policies

Petitioners suggest (Pet. Br. 41-42) various policy considerations favoring application of res judicata to the state administrative determination in this case. However, those considerations, even if valid, are irrelevant. Congress has determined that federal courts adjudicating Title VII claims should not give preclusive effect to judicially unreviewed state administrative decisions. That determination controls the present case. Furthermore, even if the weighing of policy interests were appropriate, they would counsel against giving preclusive effect to judicially unreviewed administrative decisions.

Petitioners suggest that preclusion is necessary to protect the "integrity of the adjudicatory process which the State of Tennessee has provided for the purpose of protecting Fourteenth Amendment interests affected by agency action" (Pet. Br. 41). However, this Court rejected similar arguments made with respect to federal administrative processes (see *Chandler*, 425 U.S. at 863-864) and collective bargaining agreements (see *Alexander*, 415 U.S. at 55-60). Indeed, petitioners' position quite likely would actually hamper the effectiveness of state administrative mechanisms for resolving employment disputes. Claimants, faced with the prospect that an adverse

decision from a state administrative agency would preclude a Title VII claim, might frequently choose to avoid or abandon state proceedings. That result "would undermine Congress' intent to encourage full use of state remedies." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 65, 66 n.6 (1980); see *Alexander v. Gardner-Denver Co.*, 415 U.S. at 59; cf. *Moore v. Bonner*, 695 F.2d 799, 802 (4th Cir. 1982). That result, in addition, would likely increase the workload of the federal courts and the EEOC, since they would be required to review discrimination claims without the benefit of the prior state agency examination. It also could upset the division of labor between the EEOC and state FEP agencies currently achieved through worksharing arrangements.²⁷

Petitioners suggest that nonpreclusion will "burden the federal court with needlessly relitigating an issue already fully litigated" (Pet. Br. 41). However, the legislative history of Title VII suggests that Congress favored judicial resolution of discrimination claims. For example, when Congress amended

²⁷ The Commission has entered into worksharing agreements, pursuant to Section 709(b) of Title VII, 42 U.S.C. 2000e-8(b), with many of the state FEP agencies that enforce state and local laws. See E.E.O.C. Compl. Man. (CCH) ¶¶ 281, 282 (May 1985); 29 C.F.R. 1601.13, 1601.80 (listing certified deferral agencies). Under these agreements, certain categories of discrimination charges are processed by state authorities; with respect to other categories, the state FEP agency often waives its right under the statute to initiate review and EEOC processes the charge from the outset. When the state agency processes the charges under this arrangement, EEOC generally takes no action "until the [FEP agency] issues its final findings and orders or otherwise terminates its proceedings." E.E.O.C. Compl. Man. (CCH) ¶ 284 (May 1985).

Title VII in 1972, congressmen suggested that judicial resolution of employment discrimination claims might be preferable to EEOC adjudicatory determinations because it would promote public confidence that fair employment laws were being enforced in an independent and even-handed manner. See S. Rep. 92-415, *supra*, at 85 (views of Sen. Dominick); see also *Kremer*, 456 U.S. at 474 n.15.²⁸ And as the court below noted (Pet. App. A21), "there are significant differences between the state judicial and administrative forums that counsel against federal court deference to the decisions of the latter even though Congress has required deference to the decisions of the former."

In all events, the potential inefficiencies in nonpreclusion are easily exaggerated. Claimants who have lost their discrimination claims after a full hearing are likely to be circumspect in seeking a full-scale federal readjudication. Furthermore, federal court litigation following administrative adjudication generally should be able to be foreshortened. The prior proceedings have typically narrowed the issues, less discovery is likely to be needed, and the federal court is able to consider the administrative record as evidence entitled to appropriate weight. See *Chandler*, 425 U.S. at 863 n.39; cf. *Alexander*, 415 U.S. at 60 n.21.

Finally, we note that *Kremer's* distinction between state courts and state agencies for purposes of Title VII res judicata is straightforward and easy to apply.

²⁸ Indeed, when Congress first enacted Title VII, congressmen expressed concern regarding the adequacy and effectiveness of state remedies and procedures. See 110 Cong. Rec. 7205 (1964) (Sen. Clark); *id.* at 7214 (Clark-Case interpretive memorandum).

By contrast, any attempt to apply *res judicata* principles based on the identity or character of the agency will inevitably generate confusion.²⁹ Difficult questions will arise as to whether a state agency in a given case has acted in an adjudicatory capacity within the meaning of "administrative *res judicata*" and whether it has applied standards, in reaching its finding, consistent with Title VII. Furthermore, unwary claimants may not receive judicial *de novo* consideration because they were unaware that entry into an adjudicatory phase of a state system could lead to a binding administrative decision.

In sum, *Kremer's* bright line distinction between the preclusive effect of state court judgments and the nonpreclusive effect of judicially unreviewed administrative determinations is both legally sound and practicable. The court of appeals correctly determined that the state's administrative determination rejecting respondent's claim of employment discrimination did not preclude respondent's Title VII action.

²⁹ The confusion will be particularly pronounced where federal-state worksharing agreements are in effect. Many claimants' charges are processed to completion by state agencies, rather than the EEOC, simply because the charges were administratively allocated to the state FEP agency by the worksharing agreement.

CONCLUSION

The judgment of the court of appeals, insofar as it declines to accord preclusive effect in respondent's Title VII action to a judicially unreviewed state administrative determination, should be affirmed.

Respectfully submitted.

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